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THE NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND.

EDITED BY

MARCUS D. BEGLEY,

ONE OF HIS MAJESTY'S COUNSEL.

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Lord Chief Justice.

THE RIGHT HON. WILLIAM MOORE.

Lord Justices of Appeal.

THE RIGHT HON. JAMES ANDREWS.
THE RIGHT HON. RICHARD BEST.

Chancery Division.

THE HON. DANIEL MARTIN WILSON.

King's Bench Division.

THE RIGHT HON. WILLIAM MOORE.
THE RIGHT HON. THOMAS WATTERS BROWN.

Judicial Commissioner Land Purchase Commission.

ROBERT D. MEGAW, K.C.

Attorney General.

THE RIGHT HON. ANTHONY BRUTUS BABINGTON, K.C.

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Nov. 12

ESTATE OF GEORGE THOMAS GRAHAM (1). (N.I. 894.)

Land purchase—Standard purchase annuities—Fixing rent by agreement—Period when fixed—Date of agreement or of its being filed—Northern Ireland Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 34), *Sched. III.*

A number of holdings on the estate of G. were subject to judicial rents, which had been fixed by agreements which were entered into before 15th August, 1911, and filed in the Irish Land Commission after that date.

By virtue of Sched. III to the Northern Land Act, 1925, judicial rents fixed after 15th August, 1911, are deemed to be third term judicial rents, and the standard purchase annuities are calculated accordingly.

When the estate was about to become vested in the Land Purchase Commission, the holdings in question were described in the provisional list as being subject to third term judicial rents. The tenants affected objected to their holdings being so described.

Held (reversing the decision of the Land Purchase Commission), that the dates upon which the agreements were filed were the dates upon which the judicial rents were fixed, and accordingly the holdings were correctly described in the provisional list as being subject to third term judicial rents.

APPEAL from an order of the Land Purchase Commission allowing a number of objections to the provisional list.

[The facts are fully set out in the report of the decision of the Land Purchase Commission, [1929] N.I. 155.]

MacDermott for the appellant.

Porter for the respondents.

MOORE L.C.J.: The question which we have to decide in this case is whether a number of judicial rents, which were fixed by agreements entered into between the landlord and the tenants on the estate, are to be treated as second, or as third term judicial rents for the purpose of the provisions contained in Part II of Schedule III to the Northern Ireland Land Act, 1925.

[His Lordship here read the Schedule.]

(1) In the Court of Appeal before Moore, L.C.J. and Andrews and Best, L.JJ.

C.A. 1929.

ESTATE OF GEORGE THOMAS GRAHAM

Moore, L.C.J.

It will be observed that the expression used is "judicial rent." That can only mean a rent fixed by order of the Court. As has been pointed out, a rent may be "a fair rent" yet not a judicial rent.

I quite agree with the statement of the law generally with reference to the relation back of the operation of agreements as stated by the learned Judicial Commissioner, but I venture to think that in the present case he has overlooked the express provisions of section 8, sub-s. 6, of the Land Law (Ireland) Act, 1881, by which a rent fixed by agreement does not become a judicial rent until the agreement has been filed.

I have already pointed out that we are only dealing with "judicial" rents. The circumstances in the present appeal are, that the respective agreements were signed on dates before 15th August, 1911, but not filed until after that date. The agreements themselves, unlike those referred to in the two cases cited by Mr. Porter, contain no special provision for the commencement of the term.

I see nothing in the Statute to enable us to relate the judicial quality of the rents so fixed back to the dates of the agreements. In my view, the rents in question were not fixed as judicial rents until after the crucial date, and consequently they are third term rents. This appeal must be allowed with costs.

ANDREWS L.J.: I agree with the conclusion arrived at by the Lord Chief Justice. By section 9 of the Northern Ireland Land Act, 1925, the standard price of a holding is based on the standard purchase annuity as ascertained in accordance with Schedule III to the Act. On turning to that Schedule we find that it is divided into two parts, the first dealing with those cases in which holdings are subject to judicial rents, the second with those in which the holdings are subject to rents other than judicial rents. Where, as in the present case, a holding is subject to a judicial rent, it is the amount of such rent which determines the amount of the standard purchase annuity. The percentage table set out in Part I of the Schedule contains figures which vary, both for the several counties in Northern Ireland, and according to whether the judicial rent is a first term (i.e., fixed before 16th August, 1896)

or second term (i.e., fixed between 15th August, 1896, and 16th August, 1911) or third term (i.e., fixed after 15th August, 1911).

The first important point to note, in considering the Schedule, is that the basis of calculation is the judicial rent, if such exist. Now, there is, in my opinion, a clear distinction drawn both in the Acts of Parliament which constitute the Irish Land Code, and in recognised authority, between a "fair rent" and a "judicial rent" (see Cherry's Irish Land Law, page 594). It is, in my opinion, implied in the very term "judicial rent" that, apart from express provision to the contrary, such as is contained in section 48 of the Land Law (Ireland) Act, 1896, it cannot be created by the act of the parties alone, but that it arises by virtue of some judicial act, be it the act of the Court in fixing the rent or the act of the Land Commission in filing an agreement of the landlord and tenant under the rules; for such filing has, by the express terms of section 8, sub-s. 6, of the Land Law (Ireland) Act, 1881, the same effect and consequences as if the rent were a judicial rent fixed by the Court. The rents, therefore, in the present case only became, in my opinion, judicial rents after 15th August, 1911.

I would only add that the necessity for filing an agreement fixing a fair rent in order to convert it into a judicial rent is clearly recognised by the proviso in clause 6 of Part II of Schedule III to the Act of 1925.

For these reasons these judicial rents must, in my opinion, be regarded as third term judicial rents, and the appeal must be allowed with costs.

BEST L.J.: In my opinion, the agreements, although they fixed "fair rents" on the dates upon which they were executed, did not fix "judicial rents" until they were filed.

I agree that the appeal should be allowed with costs.

Solicitors for the appellants: *J. & A. Caruth & Owens.*
Solicitors for the respondents: *John K. Currie & Son.*

J. D. C.

H.L.
1929.

June 10, 11,
13, 14, 17,
18, 20, 21.
24. July, 26.

[HOUSE OF LORDS. (1).]

CLARK AND OTHERS v. URQUHART.
STRACEY AND OTHERS v. URQUHART.

Company—Statements in prospectus—Liability for—Companies (Consolidation) Act, 8 Ed. 7, c. 69, s. 84—Construction of, and meaning of "compensation"—Payment into Court—How far satisfaction of alternative claims—Costs, where payment into Court and issue stayed by act of co-defendants and plaintiff—Measure of Damages.

The respondent, on the faith of a prospectus, applied for and was allotted £200 debenture stock of W. C. & Co., Ltd., and sought to recover damages (a) on the ground of fraudulent misrepresentation in the prospectus; (b) alternatively, on the ground of untrue statements in the prospectus entitling him to compensation under s. 84 of the Companies (Consolidation) Act, 1908; (c) alternatively, on the ground of a conspiracy on the part of the appellants and others to defraud him and the other subscribers of their money. The particulars relied on in support of each cause of action were largely the same, and the damages, £178, were claimed in one paragraph as applicable to all three.

Brown, J., at the trial *held* that there was no evidence to go to the jury against the first set of appellants on any of the causes of action, and, that, as against the second set of appellants, the only evidence to go to the jury was in respect of the first cause of action. The second appellants having then been granted leave to amend their defence by lodging in Court with a denial of liability the sum of £130 in satisfaction of the first cause of action, the respondent accepted this sum in satisfaction of the matters in respect of which it was paid into Court, and judgment was given for the second appellants on the second and third causes of action, with the costs of the action on the issues arising thereon, and for the first appellants on all the causes of action with costs.

The Court of Appeal (Moore, L.C.J., Andrews and Best, L.JJ.) reversed the judgment of Brown, J., holding that there was evidence to go to the jury against all the defendants on all the causes of action. They also *held* that the acceptance by the respondent of the money paid into Court discharged all the defendants in respect of the first cause of action, but not in respect of the other two causes of action. They further *held* that the measure of damages in the cause of action for conspiracy, and, also, that the compensation under section 84 of the Companies (Consolidation) Act, 1908 (on this point Andrews, L.J., dissented) was wider than that for fraudulent misrepresentation, and directed a new trial.

The House of Lords (1), affirming the Court of Appeal, *held* that there was evidence to go to the jury in respect of each of the causes of action; and,

Held, reversing the Court of Appeal, that the respondent having accepted the £130 in satisfaction of one of the alternative causes of action,

(1) In the House of Lords. Present: Viscount Sumner and Lords Blanesburgh, Atkin, Tomlin and Thankerton.

and such sum being sufficient to cover the damages on any of the causes of action, no new trial should be allowed upon the other alternatives; and,

Held, reversing the majority of the Court of Appeal and affirming Andrews, L.J., that the measure of compensation under section 84 of the Companies (Consolidation) Act, 1908, was the same as the measure of damages for fraudulent misrepresentation.

McConnell v. *Wright* ([1903] 1 Ch. 546) and *Beadon* v. *Capital Syndicate, Ltd.* (28 T.L.R. 394), discussed.

H.L. 1929.

CLARK v. URQUHART. STRACEY v. URQUHART.

APPEALS from an Order of the Court of Appeal in Northern Ireland dated 14th May, 1928, which reversed an Order and Judgment of the Right Hon. Mr. Justice Brown made by him in the King's Bench Division of the High Court of Justice in Northern Ireland, dated respectively the 24th and 28th November, in an action in which the appellants Sir George Smith Clark, Bart., George Ernest Clark, Charles E. Allan, and others were defendants, and the respondent William Urquhart was plaintiff.

For the defendants Sir George S. Clark, Bart., Charles E. Allan and George E. Clark: *The Rt. Hon. H. P. Macmillan K.C.*, *Stuart Bevan K.C.*, *J. H. Stamp* and *E. Warnock*.

For the defendants Sir Edward Paulet Stracey, Bart., Sir Edward Mackey Edgar, Edward Welton, James Walter Stronge, Eric Stephen Astleigh Sperling, and Edward Philip Andreae (formerly carrying on business as Sperling & Company), Sir Edward Mackey Edgar and Robert A. Workman: *Wilfred Green K.C.*, *C. B. Marriott K.C.* and *J. M. Whitaker K.C.*

For the plaintiff: *E. S. Murphy K.C.*, *A. K. Overend K.C.*, *A. S. Comyns Carr K.C.* and *J. H. S. Russell*.

VISCOUNT SUMNER (1): My Lords, the plaintiff is a Belfast coach builder who on 12th February, 1920, subscribed for £200, part of an issue of £3,000,000, 7 per cent. guaranteed first mortgage debenture stock of Workman, Clark & Company, Limited, and received an allotment of that amount, of which he is the holder still.

VISCOUNT SUMNER.

On 21st January, 1926, he sued Workman, Clark & Company, Limited, the Northumberland Shipbuilding

(1) The report of the speeches in the House of Lords is printed from the shorthand notes of Messrs. W. B. Gurney & Sons.

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Company, Limited, and a number of private persons, whom it will be convenient to classify in three groups, namely, "the old directors," "the new directors" and "the Sperling partners." Two other persons, Frank Workman and Sir John Esplen, were joined, but are not now parties. Against one the action abated on his death; against the other it was struck out with costs. Further, the Northumberland Shipbuilding Company, Limited, is in liquidation, and is not before your Lordships, and as against Workman, Clark & Company, Limited, the action was discontinued on terms in January, 1927.

Your Lordships are informed that this action is one of many similar actions, and was selected by parties interested as the one to be proceeded with. Whether any of these other actions after all these years is still in being we do not know, but I ought to say that, in dealing with the facts of this case, I have desired to confine myself to the question whether there was evidence fit to have been left to the jury, and not to prejudge and prejudice the result of any proceedings in the future, in which evidence in answer to it may be given. The plaintiff did not join any other debenture stockholders, nor did he sue in any representative capacity. The old directors were directors of Workman, Clark & Company, Limited, in 1919, and held large amounts of the ordinary shares, which early in 1920 they sold to Frank Workman, acting on behalf of others. Thereafter, though they continued to be directors, they held only the bare qualification shares, and these only as nominees until they ceased to be directors early in 1921. These defendants are Sir George Clark, George Ernest Clark and Charles Edward Allan, the appellants in the first of the two appeals, which have been heard together by your Lordships. The new directors became directors of Workman, Clark & Company, Limited, on 10th February, 1920, and continued to be directors at all material times thereafter. They are R. A. Workman, who was chairman of the Northumberland Shipbuilding Company, Limited, and Sir Mackay Edgar, one of the Sperling partners, six in all, who at the material times traded in London as merchant bankers, though their partnership has since been dissolved. The new directors and the Sperling partners together are the

appellants in the second of these appeals. The plaintiff is the respondent in both.

The statement of claim alleged three causes of action. The first was in deceit for fraudulent misrepresentations contained in the prospectus, dated 11th February, 1920, upon which he applied for the debenture stock. The third was for conspiracy to practice that deceit, and to carry out at subsequent dates sundry dealings with the assets of Workman, Clark & Company, Limited, and other companies to the prejudice of the security for the debenture stock. The second was under section 84 of the Companies (Consolidation) Act, 1908, for compensation for the falsity of the statements complained of as against all defendants who were directors of Workman, Clark & Company, Limited, when, as was alleged to have been the case, the prospectus was issued on the Company's behalf. These are the defendants, Edgar, R. A. Workman, the two Clarks and Allan. Against the old directors conspiracy was alleged only in regard to acts done before they ceased to be directors, otherwise all these persons were implicated in the charges of fraud and conspiracy. As a matter of pleading the second cause of action and again the third were alleged with the words "alternatively" or "in the alternative" prefixed, the particulars relied on in support of each cause of action were to a large extent the same, and damages, £178, were alleged and claimed in one concluding paragraph applicable to all three, and stated in particulars to be so intended.

At the trial, on the conclusion of the plaintiff's evidence, it was submitted on behalf of all the defendants by their respective counsel that there was no case to go to the jury as against any of them on any of the causes of action. As against the old directors the learned Trial Judge sustained the submission (1); as against the defendants, who are concerned in the second appeal, he held that there was a case to go to the jury in respect of certain of the alleged fraudulent misrepresentations, but not in respect of any other cause of action. This was on November 24th, 1927.

The next step is succinctly set out in paragraph 23 of the case of the appellants in the second appeal:—"The

(1) [1928] N.I. 40.

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VISCOUNT SUMNER.

trial of the action was to have proceeded against the appellants on 28th November, 1927, in so much of the first cause of action alleged in the statement of claim as the learned Judge had ruled was proper to be left to the jury, but at the sitting of the Court on 28th November, 1927, these appellants applied for and obtained leave to amend their defence, and, whilst denying liability, they brought into court the sum of £130 on their own behalf and also on behalf of the Northumberland Shipbuilding Co., Ltd., in respect of the respondent's claim on the first cause of action, which sum the respondent accepted in satisfaction thereof. The sum of £130 was the figure put forward by the respondent's witness, Mr. Arthur Collins, as the total amount of damage alleged to have been suffered by the respondent in respect of any of the said alleged causes of action, apart from a suggested claim for loss of interest, which these appellants submit was in any event irrecoverable."

This stroke was skilfully timed. The plaintiff had now one group only, against whom to seek redress, and that on only one of his causes of action. He had to pay the old directors their costs; if he went on with the trial and failed to recover more than had been paid into Court he would have also to pay the other defendants' costs subsequent to the payment in. The proved damages having been all brought into Court, his legal right to more was, to say the least of it, precarious, and, if the Sperling partners or the new directors were to give evidence they might clear themselves altogether. Whether he recovered the £130 by judgment in the action or took it out of Court in satisfaction, his claim against the other defendants, as joint tortfeasors, would disappear.

He made his choice, and obtained from the learned Trial Judge, as a condition of giving leave to bring the money into Court, an order for payment of his general costs of the action, including the costs of the issues arising out of the prospectus claim, and, further, to guard against it being said that in effect the appeal was as to costs only, he got leave to appeal. He then took the £130 out of Court in satisfaction, and gave notice of appeal against the judgments, which had dismissed the old directors altogether, and had disposed of the alterna-

tive causes of action. He asked to have them set aside, and that a new trial should be ordered on the issues other than that of deceit as against all the defendants.

One other course was considered, an adjournment of the trial pending the determination of an appeal against the above-mentioned judgments, but this was thought to be impracticable, and so I should think it was. Apart from objections, which were to be expected from the new directors and the Sperling partners, and possibly from the learned Judge himself, on the ground of its great and general inconvenience, nothing but the consent of the Court of Appeal in Northern Ireland and, in case of a further appeal, of this House to a drastic expedition of the hearings could avert the probability, that in the ordinary course of nature the entire jury could not be reassembled for the adjourned trial, in which case, without the consent of the whole body of defendants, a new trial would be inevitable.

The plaintiff was advised, and very plausibly, to argue that the trial, so far as it had gone, had been made "abortive" in large measure by the course which the successful defendants and the others had taken, and that his costs thus thrown away ought to be paid by them, but the question remained whether this result was not entirely justified under the Orders and Rules. In any case how can defendants be required to pay costs on an issue which the plaintiff never had proved, and as to which he did not and could not ask for a new trial?

On appeal (1) the plaintiff was successful, one Lord Justice dissenting on one point only. The Court held that there was evidence to go to the jury on the second and third causes of action as against all the defendants, and that the trial should not have been interrupted. They held further that these causes of action had not been satisfied on taking the money out of Court, for it was paid in only to the cause of action for deceit, and the other two —for one of which compensation, not damages, was recoverable by statute, while the gist of the other was not deceit but conspiracy to deceive—were not identical with the first nor incapable of leading to the recovery of further sums. Accordingly, the plaintiff's rights and remedies

(1) [1928] N.I. 162.

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VISCOUNT SUMNER.

were not exhausted, but ought to be tried out against the old directors on the first issue and against all the defendants on the others. Although the first issue, the onus of which did not lie on them, had never been tried out, the old directors were ordered to pay the costs referable to it down to 24th November, 1927, and the Court declared that the plaintiff was entitled to the costs of the trial already had, so far as referable to the other issues, down to that date against all the defendants, other than the Northumberland Shipbuilding Company, Limited, and Sir John Esplen, who were no longer parties. Against this the present appeals have been brought.

The questions evidently fall under three heads:—(a) Ought the learned Trial Judge to have held that on any cause of action as against any of the defendants there was no evidence fit to go to the jury; (b) in view of the payment in and taking out of the £130 in satisfaction of the first cause of action, was there any outstanding right in the plaintiff in respect of which a new trial could be ordered; and (c) were the orders, which were made against the defendants as to costs, or any of them, justifiable in principle?

The moment selected for the issue of the prospectus was peculiar. According to the secretary to Workman, Clark & Company, Limited, who was the plaintiff's chief witness, the latter part of 1919 and the first of 1920 was a period of great expectations. Everybody, "from the Prime Minister downwards," said so; as the result of the war shipbuilders had ten years of work before them. "Combines" were the order of the day, and March, 1920, was the "peak of the boom." For a "combine" at such a moment Workman, Clark & Company, Limited, was a company with special attractions. Its long experience and success, its extensive clientèle, its reputation both local and world-wide, its well-equipped yards and its large undistributed assets, made it the very thing for those who construct combines. First to acquire control of it, next to attract the public, and thirdly to trust and lead others to trust in the future was the obvious scheme, legitimate enough in itself. Time, however, pressed; popular interest had to be caught at the flood, and the temptation to assure a quick success might easily

override some scruples in the matter of accuracy. No persons could better appreciate all this than the directors, old and new.

The facts relating to the issue of the debenture stock and the participation of the various defendants have been closely examined, but before considering them the general character of the issue deserves attention. The stock, though a first charge and guaranteed by the Northumberland Shipbuilding Company was a 7 per cent. stock, issued at a discount of £5 per cent., redeemable at the end of twenty years at a premium of £5 per cent., and strengthened by an annual sinking fund of £150,000. As the whole share capital of Workman, Clark & Company, Limited, viz., 43,200 shares of £25 each, had been issued and fully paid, and was little more in amount than one-third of this debenture issue, and as £210,000 would be required annually for interest and £150,000 for the sinking fund, all to be earned out of building large ships, it is evident from the terms offered that money was much needed somewhere. The existing securities, available for future business, were of the first importance, since the service of this issue must come out of trading profits in the first instance. It is true that there was the Northumberland Shipbuilding Company, Limited, behind it, but that company, though its shilling shares are said about this time to have gone to £2 each, had its own business and its other acquisitions to provide for, and the prospectus did not give much information about it, except that its profits for the two years ending June 30th, 1919, averaged £275,216, a figure "quite inadequate as a basis of future earnings." Shipbuilding requires either considerable working capital or considerable credit during construction, as well as extensive yards and plant. It is fairly evident that a prospectus would not appeal to sensible subscribers if it stated that the company had just parted with all its realisable securities, and did not propose to employ by any means the whole of the proceeds of the debenture stock issue in financing its proper business, yet this was the fact. It is evident also that some mention of the physical assets and realisable securities had to be made, since a total omission would be hardly less prejudicial than a candid explanation about them.

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How then did this carefully drafted document deal with them?

It was stated on the authority of Mr. Henry Boyd, M.I.N.A., that the physical assets were worth £4,012,100, no more and no less, an estimate so precise as to imply prolonged deliberation; and, on the authority of R. A. Workman, as chairman of the Company which had just acquired all the ordinary shares, that on February 3rd, Workman, Clark & Company, Limited, had investments worth approximately £1,600,000, and it declared that, in addition to 37 ships then on order, and in spite of the large amount of work then in hand, other work could be commenced at an early date and large profits might thus be expected. It stated in terms that the issue was charged on all the Company's assets, though without prejudice to its right to dispose of them in the ordinary course of its business. An intending subscriber might reasonably infer that these investments and the proceeds of the issue were intact, and would be available for financing these lucrative undertakings. He would never guess that the Company had already disposed of them, not in the ordinary course of its business, but because the Northumberland Shipbuilding Company, Limited, the guarantors so much in evidence, had paid for their purchase of the ordinary shares by realising the securities and drawing on the proceeds of the issue, as they could not fulfil their bargain otherwise. Of course, if they proved in the future to be rich enought to secure the issue, principal, interest and premium by their own resources, this would not ultimately matter, but an intending subscriber might quite probably think that in the meantime it did.

Now all the appellants knew these statements to be misleading and untrue, and the old directors at any rate, whatever the others did, felt much compunction about it. They knew that Mr. Boyd's valuation was excessive; they knew that the Company could not and was not meant to utilise these large realisable sums in building ships and securing the debenture stock. As instructed, Mr. Boyd had valued at the cost of replacing the plant, though a debenture stockholder wants to know what he can sell the plant for in case of need, not what it will cost him to replace it, if renewal at his expense should be required.

The plaintiff's witnesses proved, if proof was necessary, that this basis was improper. The old directors were shocked at it, all the more as they knew that Mr. Boyd spent only twenty-four hours in Belfast altogether, when he purported to value so precisely 109 acres of land, containing twelve shipbuilding berths, with boiler-making shops and boiler shops and blacksmiths shops and engineering works, principal and subsidiary, and an iron foundry as well, all fully equipped with machines and tools.

My Lords, I recognise that the position of the old directors differed in many respects from that of the new ones, and their difficulties would have been well worthy the attention of a jury. They were not the leaders as the others were, and perhaps they allowed themselves to be overborne. Still they had a personal interest in the success of the scheme, which they could perceive to be on foot, since it was through the scheme that payment for their shares was made, and there was evidence in the acts done by them to facilitate that scheme, without objection or inquiry, from which knowledge and assent to it, before it was carried out, might reasonably be inferred. The circumstances are briefly these.

For some little time before 12th November, 1919, reports were going about that the business of Workman, Clark & Company, Limited, had been or was about to be disposed of. Sir George Clark contradicted them, but at a board meeting on that day, at which George Ernest Clark and C. E. Allan were present, he mentioned them, and it was proposed that an extraordinary general meeting of the Company should be held for the purpose of considering the various schemes for the reorganisation of the Company. Although the proposal was not pressed, this discussion at any rate shows that something was already in the wind to the knowledge of the old directors. The minutes of this and of some subsequent meetings show that there was a contest for the control of the Company between Sir George Clark and his friends and a rival group, headed by the chairman, Frank Workman, which was ultimately terminated, on 23rd December, 1919, when the board unanimously agreed to accept the chairman as the purchaser of the Clark and Allan interests,

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This purchase, it was disclosed, was made on behalf of others, of whom the Northumberland Shipbuilding Company, Limited, was one, and ultimately the only one, and eventually at a board meeting on 13th January, 1920, attended by C. E. Allan and G. E. Clark, transfers of 34,668 shares (9,020 being shares of Sir G. Clark) were passed, and also a transfer of the same number of shares to two persons, who in fact were nominees of the London County and Westminster Bank. At the same time Messrs. Kleinwort, Sons & Company were authorised to realize the Company's investments, subject to the approval of Messrs. Sperling and Company.

So far as the minutes of these meetings go there was no discussion of the reason for these transfers or of the purposes for which the authority was given to Messrs. Kleinwort, but, as the old directors still remained members of the board, I think that on this alone in the absence of their explanations the jury would be entitled to infer either that they knew the meaning and effect of these proceedings or that they were deliberately indifferent to them. The correspondence, however, which the defendants disclosed carried matters a good deal further. From this it appears that the price of £80 per share was offered by F. Workman on the authority of Sperling & Company; that Sir George Clark and C. E. Allan stipulated that they should remain as directors with authority to exercise supervision of vessels then on order, and that this stipulation was agreed to by R. A. Workman, chairman of the Northumberland Shipbuilding Company, Limited, and was given effect to, whereupon Sir George Clark withdrew his own offer to buy at £81 per share, and assented to the acceptance of F. Workman's offer of £80.

My Lords, I do not forget that at first there was keen antagonism between Sir George Clark and Frank Workman on the question of control of the Company, and that after the sale of Sir George's shares their personal feelings are said to have been much the same as before, but this was a point for the jury. At any rate, they are found concurring in business communications at a later date, and Sir George Clark, who had obtained an interim injunction to restrain some of the steps in Workman's plan, elected to make no use of it, but agreed to sell out himself.

Considering that the total purchase money for the 34,668 shares transferred by Sir George Clark and his group amounted to over two and three quarter million pounds, that the Northumberland Shipbuilding Company's balance sheet showed that it at any rate had no available assets for more than a small fraction of this amount, and that no other and more responsible persons appeared as purchasers in the documents disclosed, Sir George Clark and his friends had some reason to be concerned about payment of the price for the highly valuable property which they proceeded to transfer, unless, indeed, they knew quite well that in the process of tapping all resources, as Mr. R. A. Workman calls it, they would be provided for, as they were, by utilising the realisable investments and the proceeds of the issue. However, they do not appear to have been anxious, nor was their confidence misplaced. On January 15th, 1920, Kleinwort & Company paid to Frank Workman the price of 42,246 shares against surrender of transfers, and in due course the old directors were paid. Kleinwort & Company charged this sum to a special loan account in the name of the Northumberland Shipbuilding Company, Limited, and although the proceeds of the sale of the Company's investments were for a time duly credited to the Company, it was eventually paid off from the sources I have mentioned.

Even with the materials disclosed by the defendants a jury would be fully entitled, and reasonably well informed for that purpose, to find that the old directors knew long before the date of the debenture issue that it was to be the main source for the payments, in which they were so much interested. They furnished R. A. Workman with a full list of the investments of Workman, Clark & Company, Limited, with a balance sheet to August, 1919, and a cash statement to date, and on 5th January Sir George was informed that all arrangements were made to pay over the cash as soon as the papers were in order, "so that everything could be carried through next week." The knowledge of and concurrence in some scheme for a public issue which is thus far to be inferred, becomes more definite, and the consciousness of the old directors that the proposed statements would never do becomes more explicit in the subsequent letters,

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On the 8th Sir George was told that the intention was to create debentures as soon as the purchase was completed, for which purpose Mr. Boyd was being sent to Belfast "to make up an independent valuation of present-day replacement value of physical assets." On 19th January C. E. Allan was informed that the secretary was busy handing over the securities to Messrs. Kleinwort, and ten days later the draft prospectus was in the hands of Sir George Clark and C. E. Allan, and a telegram was sent in the name of Workman, Clark & Company, Limited, "We would need to have an opportunity of going over details before authorising its issue," while F. Workman telegraphed, "Neither I nor other directors could possibly let our names go on prospectus as it stands." It was to this that R. A. Workman replied that the Company's solicitor advised that Workman, Clark & Company, Limited, had no responsibility whatever in connection with the prospectus, which was issued by Sperling & Company. For reasons which it might have been supposed that the jury would have heard from these directors themselves, they acquiesced in this view. They wrote along with F. Workman on 5th February, 1920, to Sperling & Company, "although Mr. Boyd's valuation is in excess of our own ideas, we do not consider it necessary to press an objection to it," and they agreed, apparently with satisfaction, to the proposed statement, referring to a "conservative estimate" of £2,000,000 for the profit to be made in 1920, 1921 and 1922, that "it will be understood that this estimate does not take into consideration any income from the Company's investments or from the proceeds of the sale of the debenture stock now offered." They then corrected an error, which for some reason they call "technical," consisting in an under-statement of the Company's annual tonnage output in the past, and they conclude, "If you will send in a draft of the prospectus revised on these lines, we will return it at once after approval." In the absence of further explanations I think that a jury might, and probably would, have made three reflections on this letter. (1) This is inconsistent with the prospectus being merely Sperling & Company's document; it points to its being, in the writers' view, a prospectus which they as directors

of the Company have to consider, and can either object to or approve. (2) After full consideration it was in substance approved by them, and this was therefore some evidence that it was issued with their authority. (3) To say that the estimate of profits, large as it is, does not take into consideration income from about four and a half millions of investments of the Company, and proceeds of the sale of its debenture stock is not a plain way of saying that there are no investments and that most, if not all, of the proceeds in question are to be used otherwise than in making profits by building ships at Belfast, and might be read by a hopeful investor as conveying that, in addition to profits from shipbuilding, the Company's resources would be enhanced by income from existing and from future investments of millions of pounds.

Matters then went rapidly forward, and the necessary meetings of the board and the shareholders were summoned for 10th February in London. F. Workman asked Sir Mackay Edgar if any of the Belfast directors should come over and was told that there would be enough directors in London, and they need not trouble. Whether he showed this to the old directors is not stated, though it is well to observe here once and for all that within each group the facts as to knowledge, notice and communications have been treated as common to all, and no objection seems to have been taken at the trial or since to documents being read as if not only those named as parties to them but others in the same interest, who naturally would be aware of them, had been named so as to make them fully and technically evidence against the whole group. The fact in any case remains that the old directors did not trouble to come to London, and the various resolutions, which led to the opening of the subscription list on the incriminated prospectus next day, were duly passed without them. On this part of the case I think there was evidence to go to the jury that the old and the new directors alike were parties to the issue of this prospectus to the public, having an interest in the subscription to the issue, and knowing that it was to be invited on the faith of material statements which they knew to be untrue. It was for them to meet this charge by evidence if they thought fit. Various matters were

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pointed out by Counsel as evidence of conduct inconsistent with the existence in the minds of the old directors of any intention to deceive. For example, they subscribed for many thousands of pounds of the stock, and took it up. Would they have parted with their money if they had thought the prospectus misleading? They asked after the issue what had become of the proceeds of the Company's investments, and complained when they learnt that the money had been transferred to the Northumberland Shipbuilding Company. It is true that the objection in the latter case was to the fact that they had not been informed, not to the fact that the payment had been made. On the other hand, the suggestion that the investment in the debenture stock was promptly got rid of was met by an apparently satisfactory explanation. All this, however, is rebutting evidence. I desire to convey no opinion adverse to its efficacy, but it was entirely for the jury.

My Lords, I turn now to the charge of conspiracy as to which the view taken on the appeal was that wider damages would or might be recoverable than those recoverable for the deceit, so that the money in court did not completely satisfy this cause of action. Two questions arise here: (i) under the head of conspiracy may more acts causing mischief be proved and be the subject of money damages than under the head of obtaining subscriptions to a fraudulent prospectus, or (ii) upon the same injurious act and in respect of the same mischievous consequences, may a jury deal out money with a more liberal hand in the one case than in the other? A third proposition was advanced during the arguments in this House namely, that the evidence might be regarded as having disclosed two separate or at any rate several conspiracies, the first to deceive investors by getting them to subscribe on the faith of false representations, and the second to injure them, after they had subscribed, by depleting the security and diminishing or destroying the value of the stock allotted to them. On all these points my answer must be "No."

On the pleadings as they stand—and they have never been amended in this regard, nor has any such amendment been applied for—only one damnifying act and only

one conspiracy to cause that act to be done has ever been suggested, and, even so, only as an alternative to the cause of action in deceit. It is true that in giving particulars the plaintiff cast his net wide. His conspiracy was one which in the nature of things could only be collected by inference from overt acts, and his allegation of overt acts included many which were only committed after, and sometimes long after, the date at which he sent in his subscription and parted with his money. Still, the language of his claim is explicit—paragraph 5, "conspired to defraud the plaintiff among other persons, who might, and subsequently did, become subscribers to the issue of debenture stock of the said Company, of their monies"—and his particulars of 21st March, 1927, say "under paragraph 7" (which asked for particulars of all three causes of action) "the difference between the present market price of the debenture stock and the par price thereof and such interest as the plaintiff would have but has not received were it not for the matters alleged in the statement of claim." Acts subsequent to the subscriptions were, or might be, relevant to proof of the concert in pursuance of which the prospectus was issued, the objects which it was to serve, and the existence of an intention to deceive, which lay behind the untrue statements in it contained. In their nature the facts pleaded and particularised did not go beyond matters identical in all these claims. Such I am sure was the whole purport of the evidence which was given in support of these particulars, nor do I think that anything was ever thought of but an alternative way of getting the same damages under another head of tort. I see no ground on which this claim can now be amended or enlarged. As to the measure of damages, it may be that there are cases in which proof that a joint tort was done in pursuance of a conspiracy to do it, will justify some increase of the damages to be awarded for the tort itself, though none such has occurred to me, but in the absence of any authority for such a course in connection with an action on a fraudulent prospectus, I think that, before damages can be aggravated, there must be evidence that the actual wrong was attended by some circumstances of aggravation, or is so incapable of precise measurement that a

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jury must be left (within limits) to do what it thinks right between man and man. A plaintiff cannot be allowed, simply by using one technical term where another would equally cover his wrong, to aggravate the jury into giving him extra money not for any injury to himself but for the offence to their own sense of moral propriety. As to the view that there were two conspiracies and not merely one, I do not think, even if the necessary amendments in the pleading were to be allowed, that there was any evidence to support it. The evidence is strong and is uncontradicted that in 1920 the shipping and shipbuilding trades, in the hope that Excess Profits Duty was to be repealed, built airy castles with a confidence that passes my understanding, and when the budget of that year continued and increased it contracts for ships to be built were cancelled, contracts for steel to build them with were broken, ships in being were unsaleable, financial accommodation was hard to come by, and huge damages were incurred by shipbuilders and had to be faced, and all sorts of bubbles burst, and it is in view of this that the subsequent charges must be considered. Apart from dealings with the proceeds of the issue, which completed that disposition of them, which was so contrary to the terms of the prospectus, I do not think that the events subsequent to the allotment constitute any evidence of any conspiracy. They are such as might be done by perplexed speculators who have capitalised the future and then found that there was nothing in it, and have therefore, turned to desperate devices in the hope of averting complete ruin. The persons concerned are not shown to have manipulated the interests of the debenture stockholders in order to profit themselves, and I think it was rightly submitted to your Lordships that, knowing little of these things and viewing them only afar off, we ought to beware lest we should mistake our uninformed disapproval of fancy finance for a penetrating detection of some dishonesty, artfully hidden from general view in the intricacies of the Companies (Consolidation) Act, 1908.

A further point was discussed, rather as an apprehension of the appellants' Counsel than as an argument actually advanced for the respondent, that the mere act of conspiring is a wrong in itself, which would survive

as a subject for trial and perhaps for general damages, even after the cause of action for actual wrongful acts, done in pursuance of it, has been satisfied. I do not think that any such question arises for decision, or that any hypothetical opinion on it would be opportune. Your Lordships will have observed that there is no evidence of malice against the plaintiff here, except such as is involved in the bare doing of a legal wrong. To the conspirators he was no more than a prospective and insignificant atom in a mass of possible investors, and in any case it was only his money that they wanted, or another's. They had no feelings of any kind towards him. Again this is in no sense an act or series of acts done in combination, and thus made formidable and wrongful, though, if done singly, they would have constituted no wrong at all. I therefore think that the point suggested may be left without opinion or decision.

My Lords, I think on the head of conspiracy there was evidence that the old directors combined with the other appellants to get from the plaintiff the amount of his subscription to the issue. It is true that in the particulars and in the evidence financial dealings between the various companies concerned and manipulation of their assets were included with which the old directors had little to do, but I think that apart from these there was enough to require that this alternative case should also go to the jury. For the reasons already given, however, it is in my opinion impossible to say that this cause of action was not, like the claim for deceit, fully satisfied by taking out the money which had been paid into Court.

I wish further to add that, whether these subsequent financial proceedings were put as a new conspiracy or only as damage arising from the old one, additional to the loss of the money subscribed, in neither case were the proper parties before the Court to enable such matters to be gone into. The proceeds of the sale of the investments and of the debenture stock of the company were monies of the Company, and the Company was the party wronged by any misapplication of them. The debenture stockholders had the benefit of a charge over these monies, and were protected by the trustees of the debenture stock. They had other rights against Workman, Clark & Com-

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pany, Limited, and against the Northumberland Shipbuilding Company, Limited, but action prejudicing the charge or the liabilities of the two Companies was action directly injuring the whole body of debenture stockholders, as a body and *pari passu*, and affected them as individuals only indirectly. Unfortunately, there would be no substance in any such proceeding. Workman, Clark & Company, Limited, are still in being, but holders of a prior lien charge have, in the exercise of their rights, sold all that Company's assets, and the legal liability in debt, as for a loan which very possibly existed when Workman, Clark & Company's millions were transferred to the Northumberland Shipbuilding Company, is a liability only, for that Company is in liquidation, and has no assets. No authority in any case was produced to show that a single debenture stockholder could proceed in tort against persons who had acted as directors either of the debtor Company or of the Company which owned all the debtor Company's shares, and I think that in principle such an action, even if it were properly raised on the pleadings, could not be sustained. A representative action on behalf of all the stockholders, an action in the name or on behalf of Workman, Clark & Company, Limited, proceedings to compel the trutsees to do their duty and take steps to protect the security, or proceedings against individual directors for misfeasance to the Company give a sufficient and well established body of remedies, and I do not think this case can be moulded so as to enable the plaintiff to go beyond them.

My Lords, I think that there is a further ground on which a new trial ought to have been refused on any cause of action. After setting out his claim in deceit and his two alternative claims, the plaintiff in paragraph 7 of his statement of claim proceeded to allege one sum of £178 as the damages which he sought to recover, applicable to all three causes of action. He also called his evidence in regard to all three at once without discrimination or distinction. The witness, Mr. Collins, purported to have computed the difference, as at the time of the plaintiff's application, between the sum which he paid for the debenture stock applied for and the real value of the stock allotted to and retained by him, on the footing

that the subsequent dealings with the security and the real state of the facts, without the misrepresentations or concealments contained in the prospectus, were all known and taken into account. It may be that his calculations left something to be desired, and one part of them he frankly abandoned, but he had had the opportunity of putting an estimate on the sum to be deducted to represent the value of the stock retained, and this ought to have taken account of the facts that interest was paid until default occurred, and that a moratorium was then granted by a resolution of a meeting of debenture stockholders, which bound the plaintiff. For any other purpose questions of interest on the debenture stock do not arise, since interest is the Company's debt to its stockholders not an independent item of damages, recoverable by a party deceived from the persons who misled him. A claimant, furthermore, must prove and recover damages, arising from one and the same cause of action, once for all; he cannot claim principal in one proceeding and interest in another, yet, if a new trial were granted on the suggestion that the amount paid into Court did not extend to interest but left it outstanding, which in my opinion is not the fact, this would be what we should be enabling the plaintiff to do. I am, therefore, unable to agree with the conclusion of the Lords Justices that, after the money in Court had been taken out in satisfaction, any cause of action or any head of damages remained unsatisfied, of which there was any evidence or which could be ordered to be tried anew.

Separate considerations affect the cause of action under section 84 of the Companies (Consolidation) Act, 1908. Speaking broadly, I am of opinion that there was evidence to go to the jury that the prospectus was issued on behalf of Workman, Clark & Company, Limited, or in other words I dissent from the view that it was entirely the prospectus of Sperling & Company, with which the directors of the Company had, as such, nothing to do. It is true that the prospectus was called an offer for sale, and stated that Sperling & Company had purchased the entire debenture stock issue and were now inviting offers from sub-purchasers, but the question whether this was true was one for the jury. A letter was read at the board

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meeting of 10th February, 1920, in which Sperling & Company purported to make such an offer, but the resolution accepting it was not communicated to Messrs. Sperling before the prospectus came out next day, but only on the 23rd February, after the issue had been fully subscribed and allotted. A jury might infer some previous and different arrangement to have been in existence. At any rate, when the prospectus came out nothing had been allotted or transferred, nor had Messrs. Sperling & Company any document of title of their own to transfer to their buyers, nor did they pay any portion of the price. Allotments were made by the Company to the applicants direct, and Sperling & Company, whose offered payment for their purchase of the issue was not exigible till 31st March, deducted 3 per cent. "commission" from the proceeds of the issue before paying them over in accordance with instructions from the Company's officers. They provided the underwriting and brokerage services for this commission, but otherwise the expenses of the issue were borne by the Company, and the procedure was such as would have been equally applicable to agents employed to bring out and finance the issue, and simply paid for those services. On the other hand, the direct share in preparing the prospectus which was taken throughout by the old directors and in a still greater measure by the new ones (Sir Mackay Edgar being also the partner in Sperling & Company, who had this business in hand on their behalf) is much more indicative of an issue by and on behalf of the Company itself. This question also was one for the jury to decide. There was at any rate evidence for them that the prospectus invited persons in the plaintiff's position to subscribe for the Company's issue of debenture stock, and, if so, the old directors and the partners in Sperling & Company, who through their partner Sir Mackay Edgar had authorised the issue, and R. A. Workman and Sir Mackay Edgar, as persons who were named as directors with their authority, were liable to pay "compensation" under section 84. A defence might have appeared, if the case had proceeded, but as the evidence stands the prospectus was issued with their knowledge and consent, and they were aware of the mis-statements which it contained, and, in the case of Mr. Boyd's valuation,

had no reasonable ground for believing that he was competent to make it. All these directors had been parties to the purchase of the shares in Workman, Clark & Company, Limited, for £3,456,000, a price which entitled the holders not only to the yards and the physical plant but also to the goodwill and the investments, and this value was arrived at in competition. They knew, therefore, that Mr. Boyd's valuation of the physical plant alone greatly exceeded this sum, and the sight of his figures shocked the consciences at any rate of the old directors.

So much for the evidence of liability. That liability gives rise under the section to a right to "compensation." With great respect to the Lords Justices, who held otherwise, I cannot hold that compensation here is, either as to the amount recoverable or the mode of measuring it, something different from and even greater than damages. Very shortly after the Directors Liability Act of 1890 was passed, which is reproduced in section 84 of the Act of 1908, it was stated on high authority that the object of it was to give, as against persons who came within its terms, the remedy which the final decision in *Peek* v. *Derry* (1) in this House had limited to those who could prove a case of deceit, and this has since been generally adopted, and in my opinion is correct. I can understand that the Legislature deemed it necessary, as a matter of policy, to make certain persons liable for false statements in a prospectus, even though they did not know them to be false. I can understand that the word compensation, which has no technical significance to the contrary, was selected because it represented the difference between the actual value of the debentures taken and the sum paid for them on the faith of the prospectus, and at the same time avoided the invidious association of damages with dishonesty in such a connection. What I cannot understand is how the Legislature should have thought fit to impose on a director, who has authorised a mis-statement innocently, a larger liability than falls on one who has done it in order to cheat, or to put it in the power of a plaintiff to get more money by omitting a charge of fraud than he could get by proving it. Again, if for some inscrutable reason such was the policy adopted, I cannot

(1) 14 A.C. 337.

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see why this gross difference was made to lurk in the use of a colourless and inoffensive word like "compensation." Great as is the difference between the elements, which constitute the two causes of action, the injury to be made good to the plaintiff is the same, and I see no reason for measuring it in one way in the one case and in a different way in the other. I am accordingly of opinion that on this issue as on that of conspiracy, though the case should have been left to the jury, there was nothing left to be tried after the plaintiff had taken out in satisfaction money paid in on the first issue only. I do not profess that this works ideal justice, and I regret it, but such, in my opinion, is the result according to law.

In view of these conclusions the question of costs, which are large in amount, becomes intricate and difficult. An objection was raised to the competency of any appeal from the Trial Judge on the ground that, as a consequence of the payment in and out of the £130, no new trial was possible, for all causes of action were satisfied and no other relief was asked for or could be given. I shrink from such a conclusion. So many days have surely not been spent in the Court of Appeal in Northern Ireland and in this House in discussing a non-existent or academic issue. Not until to-day is the conclusion judicially arrived at, that such was the result when the £130 was taken out; meantime the question was more than arguable. It was decided in the respondent's favour by a majority of the Lords Justices. Was he entitled to assert a case, which *prima facie* was right only on peril of the whole appellate procedure becoming abortive *ex post facto* if the final conclusion should go against him? If the appeals were incompetent throughout, where is the jurisdiction to deal even with the costs of them? An order had been made against the plaintiff, which was wrong at its date and which burthened him with costs payable to the old director appellants, and except by an appeal he could not be relieved. It seems to me that the order must have been appealable, unless and until he showed by his subsequent conduct an unequivocal and actual intention to acquiesce in it, and any appeal on this point opened and involved all the questions that we have discussed here.

If then the orders of Mr. Justice Brown, made on the 24th November, 1927, were wrong, they are as if they

had not been made at all. In that view what should have been done on the application for leave to amend and pay into Court? On that occasion terms might have been imposed, which would have provided, in the plaintiff's favour and at the cost of the then applicants, for the position in which he stood. He had incurred costs, both his own and the old directors, unless he got the verdict of the jury. This was not done then, and, in my opinion, we cannot do it now, for *non constat* that those, who then sought to pay money in, might not have refused to submit, and have elected to withdraw their application altogether while they still could do so. Still the situation thus arising is not one which no one but the Trial Judge had jurisdiction to deal with, nor is this House incompetent to make the order that should have been made in the Trial Court, Unless there is incompetency, the balance of convenience is overwhelmingly in favour of your Lordships doing so, and I will proceed on this footing.

I think that the order of the Court of Appeal in Northern Ireland should be varied, by discharging so much of it as ordered a new trial, but otherwise should be affirmed, and as to the costs of the appeal, that the plaintiff, who succeeded as to the more expensive part of the argument, should be paid half his taxed costs and should himself pay none, while as to the costs of and connected with the trial, I think that he should pay to the old directors their costs of the action referable to the issue of deceit, and should recover such costs over against the other defendants, but that, on the claims for conspiracy and under section 84 of the Companies Act, judgment should be entered for the defendants without costs. As to the costs of this appeal, I think that success and failure being fairly evenly divided, and apportionment of the costs according to issues being probably uncertain in its operation and certainly costly and slow, there should be no costs on either side, and I move your Lordships accordingly.

LORD BLANESBURGH: My Lords, the noble Viscount on the Woolsack has detailed so fully, albeit so succinctly, the facts of this most complicated case that, adopting his phraseology, I can express very briefly the conclusions upon the appeal at which I have arrived. In the main I

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am in entire accord with the views enunciated by my noble friend. I have reached a different conclusion on one matter only—that relating to the responsibility of the old directors.

As to them, while, for one reason alone, I am not prepared to say that upon the prospectus issue no case was made against them which called for an answer, I am satisfied that on the issue of conspiracy they were fully entitled to be exonerated at the close of the plaintiff's case.

At every stage of the story, as I see it, there is a great gulf fixed, not only between the old directors and those new directors who have been made defendants, but, although in a lesser degree, between them and the new directors who have not. If you have regard to the complete absence at the date of the prospectus of any pecuniary interest of theirs either in the Company or in the combine; if you recall the very minor part they played in connection with the prospectus, and the very plain intimation they received that excessive intrusion in relation to it would be out of place on the part of persons in no way responsible for it, you see the complete separation between them and their co-defendants. If again, when the conduct of affairs of the Company was taken over by the new board, directly responsible to the Northumberland Company as the owner in equity of all the shares, you note their absence, if not their exclusion, from the councils of the Company and combine, and their activities confined to the supervision of the Company's shipbuilding operations at Belfast that the confidence of old clients might remain justified; and if finally you have regard to their final retirement from every office before some of the transactions to which the greatest exception has been taken in these proceedings were even contemplated—I would instance the acceptance of 2,500,000 second preference shares of the Northumberland Company in satisfaction of a debt of £2,500,000, and the assumption of a large part of the liability in relation to the broken contract for purchase of the Baldwin shares entered into by another company altogether—you see how completely these old directors stand apart alike from the new directors and from those other persons who, through

the Northumberland Company, the ultimate depository of power, controlled the destinies of the combine and of every one of its constituent companies.

I cannot myself find any evidence that any one of them ever desired to bring their Company into any combine, or that in the conduct of the combine ultimately formed they either participated or desired to participate. So soon as their battle for control of their own Company was lost by the acceptance of Mr. Workman's offer and purchase of their shares in it, their serious intervention in the Company's affairs except to the extent reserved by the resolution of the 23rd December, 1919, ceased. On the 15th January, 1920, nearly a month before the prospectus was issued, all their shares had not only been parted with, but had been paid for. Thereafter their pecuniary interest in the Company disappeared. Even the twenty-five qualification shares, of which they remained the holders, were the property of Mr. Workman or his nominees. These shares had also been paid for. It has never been suggested that these directors have ever had even a scintilla of interest in the Northumberland Company, or any other unit of the combine, or any further interest in the Workman Company, save that between them they subscribed for nearly £59,000 of the debenture stock, which they took under the very prospectus by which the plaintiff alleges they deliberately sought to defraud all the subscribers. By common consent one peculiarly shabby charge made against them in relation to their subscription of this debenture stock may now, I think, be said to have been abandoned. But its abandonment makes the above statement of their position complete.

That statement appears to me of itself to go far to negative the idea that they would consciously put their hands to a prospectus of this debenture stock which they knew to be false and fraudulent. So strongly, indeed, do I feel on this head that but for one letter of theirs I would have been prepared to hold not without confidence that the learned Trial Judge was right in withdrawing this issue from the jury as against them. I refrain from taking that course, however, by reason of their letter of the 5th February, 1920, to which my noble friend has referred. These directors may well be able to explain that letter in

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a sense entirely compatible with their honour and integrity in relation to the prospectus. But it calls for an explanation, and until explained it was, I think, fit for the consideration of the jury. Although not without some hesitation, therefore, I concur in the view that, so far as they were concerned, the order of the learned Judge of the 24th November, 1927, on this first issue was mistaken.

On the issue of fraudulent conspiracy, however, so far as that is additional to the charge on the prospectus, my conclusion is different, although in view of the result on this issue reached by the noble Viscount it would be unprofitable that I should set forth at length my reasons already, perhaps, foreshadowed for it. I confine myself merely to saying that I can find on this issue of fraudulent conspiracy no evidence against the old directors fit to be submitted to the consideration of any jury.

In these circumstances so far as the substantive order of the House is concerned, while concurring in the main result I should desire, and submit it would be right, that no order for payment of any costs by the old directors, either in the Courts below or in this House, should be made. Any costs awarded to the respondent should, I think, be paid by the other appellants. Except to that extent, I am quite content with the motion which my noble friend proposes to make.

LORD ATKIN.

LORD ATKIN: My Lords, it is necessary to state the issues raised by the pleadings in order to extricate this case from the tangled web in which we find it involved. The plaintiff, in his statement of claim, included three causes of action which he pleaded in the alternative. First, he claimed against all the defendants damages for fraudulent misrepresentations contained in a prospectus whereby he was induced to subscribe for two debentures of £100 each in Workman, Clark & Company, whom I will hereafter call the Company. Secondly, he claimed against those defendants who were named in the prospectus as directors of the Company, compensation under section 84 of the Companies Act, 1908. Thirdly, he claimed against all the defendants damages for a conspiracy to defraud him as one of the class who might become subscribers to the debenture issue, the overt acts

alleged being the issue of the prospectus with its fraudulent misrepresentations and further acts which stripped the Company of the assets upon which the debenture holders had to rely for their security.

The action duly came on for trial before Mr. Justice Brown and a special jury. The defendants, or groups of them, were separately represented; for the purposes of this opinion, the only groups I need mention are the directors who have presented the first appeal, whom I will call for the purposes of this case the Clark directors; and the appellants in the second appeal, whom I will call the Sperling group, though they include Mr. R. A. Workman, not a member of the Sperling firm but chairman of the Northumberland Shipbuilding Company. The plaintiffs, after eight days, concluded their evidence, whereupon Counsel for the Clark directors submitted that there was no evidence to go to the jury against them on the claim for deceit, on the ground that there was no evidence that they had issued the prospectus and so made the representations complained of. On 21st November, 1927, the Judge so held. On 24th November he proceeded to consider submissions on behalf of all the defendants that there was no evidence to go to the jury against any of them on the remaining issues.

The Judge held that there was evidence against the Sperling group on the claim for deceit, but held that there was no evidence against any of the defendants on the claim under section 84 or for conspiracy. On 24th November a formal order was drawn up dismissing the action with costs against the Clark defendants. No formal order was then drawn up against the other defendants. Pending the arguments and decisions on these points, the attendance of the jury had from day to day been excused. On Monday, 28th November, the case was again down for hearing. By this time, as the result of the Judge's decisions, the Clark directors were no longer before the Court; the action had been dismissed against them with costs, while as to the remaining defendants, the Sperling group, the only matter that remained to be tried was the claim for deceit. When the Court sat Counsel for the remaining defendants asked for leave to amend their defence by paying into Court, with a denial of liability,

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£130, in satisfaction of the claim for deceit. Something may have to be said later as to the adequacy of this sum to satisfy the other causes of action; but it is clear that both sides considered that £130 was the full sum which the plaintiff had proved as damages for this, the only remaining cause of action. Counsel for the plaintiff therefore signified his intention to accept the sum paid in in satisfaction of the claim for deceit, on condition that the remaining defendants paid to the plaintiff the general costs of the action, including the costs of the issue as to deceit, a condition which was apparently accepted by the defendants; and at any rate was imposed by the Judge. The only remaining issue being thus disposed of the action came to an end, and the jury were discharged.

A formal order was drawn up dated November 28th giving effect to the proceedings of November 28th and to the Judge's previous decision on November 24th by giving judgment for the Sperling defendants on the claims under section 84 and for conspiracy with 'the costs of action in the issues arising thereon.' So far all is simple, and no objection can be taken to the orders made, if the decisions of the learned Judge on November 21st and November 24th stand. But the plaintiffs appealed against the orders of the learned judge that there was no evidence to go to the jury against the Clark directors on the claim for deceit or against any of the defendants on the claims under section 84 and on conspiracy. These appeals came before the Court of Appeal in May, 1928. The Court were unanimously of opinion that there was evidence to go to the jury against all the defendants, on all the causes of action. I agree with that opinion. Inasmuch as the issues raised may have to be tried in other actions I refrain from any detailed examination of the evidence, of which the Lord Chief Justice made a sufficient survey. But as the contention was put forward in this House on behalf of the Clark directors which was not apparently made before the Trial Judge that even if there were evidence that they were parties to the issue of the prospectus there was no evidence of fraud on their part, I think it necessary to say that in my opinion there was evidence to go to the jury sufficient if unexplained to justify them in concluding that these directors were aware that the statements were

untrue that the investments and the proceeds of the debenture issue were available as security for the debentures, and that the "physical assets" were of the value of £4,000,000.

The Court of Appeal were, therefore, right in setting aside the judgments entered by Mr. Justice Brown for the Clark defendants as to all the causes of action and for the defendants on the claim under section 84 and for conspiracy. The consequential orders would have been simple if the difficulty caused by the acceptance in satisfaction of the £130 paid into Court had not existed. Without that the proper order would have been to direct a stay of the action against the Clark defendants on the cause of action for deceit exercising a discretion as to the costs of those defendants, and directing a new trial as to the remaining causes of action with proper direction as to costs already incurred. In substance I think this is what the Court of Appeal did; they granted a new trial of the remaining issues, and ordered the defendants to pay the costs of the trial already had, and they ordered the Clark directors to pay the costs of the issue as to deceit up to November 24th, when that cause of action was dismissed against them.

I think that criticism might be directed against both these orders as to costs on the ground that the order to pay the costs of the remaining issues already incurred should be limited to costs thrown away, and that it seems hard measure to order defendants to pay the costs of an issue of fraud the trial of which has been stayed by the action of their co-defendants and the plaintiff, in respect of which, therefore, without fault of their own, they have been deprived of an opportunity of vindicating their innocence.

If the matter rested there I am not prepared to say whether the exercise of the discretion of the Court of Appeal in these matters could have been reviewed on appeal after the recent decision of this House in *Campbell* v. *Pollak* (1).

I think, however, that the acts of the Sperling defendants in paying £130 in satisfaction of the cause of action for deceit, and of the plaintiff in taking the sum out in

(1) 1927 A.C. 732.

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satisfaction, had more serious result on the action than was attributed to them in the Court of Appeal.

My view of the position so created is as follows: The case must be considered as though the rulings of Mr. Justice Brown on the evidence had not been made, and as though all the parties were before the Court on all the issues. The effect of taking the money out of Court is to stay the proceedings as to the cause of action in respect of which the money has been paid in, except as to costs. The plaintiff is entitled to his costs against the paying defendants unless the Judge otherwise orders. As to co-defendants not parties to the payment, the proceedings are in a like manner to be stayed against them, but the Judge has a discretion as to their costs. This is the effect of the express rule, O.XXII, r. 8a, introduced in 1913, in English Procedure; but though no such express rule has been made in North Ireland, the rule appears to do no more than give effect to the decision of the English Court of Appeal in *Beadon* v. *Capital Syndicate Ltd.* (1), based upon the former English rules which for this purpose were identical with the Irish rules. This cause of action is therefore disposed of; there is no judgment on the issue of liability for either side: though there may be a judgment for costs. What is the effect upon other causes of action included in the same action? It was suggested to us that the statement of claim was so drawn that the several causes of action are alleged alternatively in the sense that they are mutually exclusive; so that if the plaintiff succeeded on one he could no longer pursue the other.

I think that this would be to put too narrow a construction on the pleadings. In the present case, however, where the position was that the plaintiff, by the erroneous decision of the Judge given at the defendants' instance was left with only one cause of action, his action in causing the proceedings in that claim to be stayed should not be used so as to preclude him from proceeding with the other causes of action if otherwise permissible. As the Lord Chief Justice said, it would be open to him to ask for a verdict on both the remaining causes of action and then elect what judgment he should take. The result

(1) 28 T.L.R. 394.

is that unless the sum of money accepted by the plaintiff was the equivalent of the total damages he might recover on the remaining causes of action he was entitled to proceed. The payment into Court, as a matter of law, only affects the particular cause of action to which it is pleaded. It may, however, amount to such a sum as to satisfy any damage that the plaintiff has suffered on any of the causes of action. If so it would appear that the plaintiff must fail in any subsequent proceedings; for damage is an essential part of the cause of action, and if already satisfied by one of the alleged tort feasors the cause of action is destroyed. I have come to the conclusion in this case that the plaintiff in receiving the £130 received the full amount of damages which on this trial he could have received on any cause of action. The pleadings make it clear that he claimed an identical sum in respect of each cause of action.

He called evidence in proof of damage, and Mr. Collins, an accountant, constructed a table which was intended to indicate the damage suffered on all three claims. At one stage the plaintiff clearly suggested that he had suffered an element of damage for conspiracy which went beyond the damage for deceit, but on investigation this particular item was admitted to be ill-founded, and was withdrawn. In the result I think that the plaintiff in this trial rested on the evidence of damage given by Mr. Collins, which did not exceed the £130 accepted in satisfaction of the claim for deceit. It seems to me to follow that the plaintiff could not have recovered more than that sum in respect of either of the remaining causes of action; in other words, that his damage had been satisfied by the defendants or some of them.

As far as the claim on section 84 is concerned, I am of opinion that the measure of damages on such a claim is precisely the same as in an action of deceit; and in this respect I agree with the judgment of Lord Justice Andrews. In my judgment the effect of the section in the original Directors Liability Act was merely to eliminate the element of fraud from the cause of action based on misrepresentation in a prospectus, and to give the same remedy in the statutory conditions for an untrue misrepresentation as for a fraudulent misrepresentation.

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I wish to make it clear, however, that in my opinion it does not follow that because the measure of damages is the same acceptance of a sum paid into court in satisfaction of the one satisfies the other. Some of the defendants might have paid in a sum of £10 with a denial of liability in the claim for deceit, and the plaintiff might have accepted it rather than pursue the charge of fraud. I see nothing to prevent him from proceeding with the claim on the section though eventually in his damages he would have to credit the £10. The reason for the present decision is that the £130 paid in the one claim represents the full sum that could have been recovered on the other. Similarly, in the claim for conspiracy, I am far from saying that on different evidence a claim for more damages than £130 might not have been established. In the present case I do not think that the plaintiff could have recovered more than the £130.

I desire for myself to disclaim any intention in this case to decide what is the true measure of damages in an action for deceit of this kind. Both parties have accepted the measure of damages laid down in *McConnel* v. *Wright* (1). I find it difficult to suppose that there is any difference in the measure of damages in an action of deceit depending upon the nature of the transaction into which the plaintiff is fraudulently induced to enter. Whether he buys shares or buys sugar, whether he subscribes for shares, or agrees to enter into a partnership, or in any other way alters his position to his detriment, in principle, the measure of damages should be the same, and whether estimated by a jury or a judge. I should have thought it would be based on the actual damage directly flowing from the fraudulent inducement. The formula in *McConnel* v. *Wright* (1) may be correct, or it may be expressed in too rigid terms. I reserve the right to consider it if it should ever be in issue in this House.

Having reached the conclusion that if the plaintiff proceeded with the alternative claims he must fail on the ground that his actual damage was satisfied, I have to consider what order should be made. It seems to me impossible that a new trial should be ordered, and I think

(1) [1903] 1 Ch. 546.

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the orders to that effect of the Court of Appeal should be set aside. The matter should be now finally disposed of, and I think that the right order is that judgment should be entered as of 28th November, 1927, for the defendants on the claims under section 84 and for conspiracy. I think that technically the defendants would find it necessary to plead to those causes of action that, since action brought, the plaintiff's damages had been satisfied by some of the defendants by the payment into court of £130 on the action for deceit and its receipt in satisfaction, and on such plea the plaintiff could confess judgment, and tax his costs unless otherwise ordered. The opinion of Mr. Justice Lush to the contrary in *Beadon* v. *Capital Syndicate, Ltd.* (1), appears confined to the case where there is one cause of action only, and money has been paid in by some only of the defendants sued in that cause of action. So restricted I think it is right. At this stage, however, in this House it does not seem necessary to insist upon a formal amendment. If it were made it would not be right in the special circumstances to allow the plaintiff to have his costs of issues of misrepresentation and conspiracy which have never been tried. On the other hand, the defendants have undoubtedly contributed to the confusion by wrongly asking for judgment. If all the defendants had been before the Court on November 28th when the terms upon which the costs should be dealt with were before the Trial Judge, I have little doubt that the plaintiff would have asked for and might have obtained some order against the Sperling group covering the costs which he might have to pay to the Clark directors as the result of the action being stayed. We cannot revise the conditions on which the amendment to the pleadings was granted, but we can now exercise the discretion as to costs which the learned Judge would have had when the payment into court was accepted if all the defendants had been as they ought to have been before him.

LORD TOMLIN.

LORD TOMLIN (read by Lord Thankerton): My Lords, these two appeals arise in an action for damages begun

(1) 28 T.L.R. 394.

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by the respondent in the High Court of Justice, Northern Ireland, King's Bench Division.

The respondent applied for and was allotted debenture stock of the nominal value of £200 of Workman, Clark & Co., Ltd., a Belfast shipbuilding company. He applied for the stock upon a prospectus which was issued on the 11th February, 1920. In his action he seeks to recover damages (which he quantified in his statement of claim at £178) on the ground of fraudulent misrepresentation in the prospectus or alternatively on the ground of untrue statements in the prospectus entitling him to compensation under section 84 of the Companies (Consolidation) Act, 1908, or alternatively on the ground of a conspiracy on the part of the defendants to defraud him and the other subscribers of their money.

As the statement of claim was framed therefore three alternative causes of action leading up to one and the same loss to the respondent were alleged and relied upon.

The defendants to the action were numerous. Some of them have since disappeared from it. The action was discontinued against the defendants, Workman, Clark & Co., Ltd. (whom I shall call the Workman Co.), before the action came to trial. Another defendant, the Northumberland Shipbuilding Co., Ltd (whom I shall call the Northumberland Co.), went into liquidation during the pendency of the action, and has since been dissolved. Frank Workman, another defendant, died before the action came to trial, and the action was, on the 17th January, 1927, discontinued by consent against yet another defendant, Sir John Esplen. The remaining defendants are appellants before your Lordships' House.

In order to make intelligible the position in the litigation of the several appellants, a short statement of the transactions which led up to the action and of the course which the action has taken is necessary.

The Workman Co. was in the year 1919 a prosperous shipbuilding company long established in Belfast. The appellants, Sir George Smith Clark, Charles Edward Allan and George Ernest Clark (whom I shall call the first appellants) and the deceased defendant, Frank Workman, were directors of the Workman Co.

In the latter part of the year 1919 a scheme was carried through whereby the Northumberland Co. acquired the

whole of the share capital of the Workman Co. and the whole or a controlling part of the share capital in three other companies. In connection with this scheme an issue of £3,000,000 5 per cent. debenture stock of the Workman Co. was made.

Of the appellants in the second appeal (whom I shall call the second appellants) the appellants, Sir Edward Mackay Edgar and Robert Workman, were directors of the Northumberland Co., the appellant, Robert Workman, being the chairman of the board of directors.

The others of the second appellants and the appellant, Sir E. M. Edgar, carried on business as merchant bankers under the style of Sperling & Co.

As a result of the scheme which I have mentioned the control of the Workman Co. passed into the hands of the Northumberland Co., and on the 10th February, 1920, the appellants, R. A. Workman and Sir E. M. Edgar, and the defendant, Sir John Esplen, who was also a director of the Northumberland Co., became directors of the Workman Co. The first appellants and the deceased defendant, Frank Workman, continued directors of the Workman Co. until some months later, apparently for the purpose of superintending the carrying out of certain shipbuilding contracts previously entered into by that Company.

On the 11th February, 1920, the prospectus upon which the respondent acted, appeared. It purported to be an offer by Messrs. Sperling & Co. to sell the whole issue of £3,000,000 5 per cent. debenture stock of the Workman Co. at 95 per cent. The prospectus stated that this debenture stock had been acquired by Messrs. Sperling & Co. at the price at which it was offered for sale subject to the payment of a commission of 3 per cent. The stock was expressed to carry interest at 7 per cent., and to be redeemable at 105 per cent. on or before the 1st February, 1940, to be guaranteed both as to principal and interest and premium by the Northumberland Co.

The respondent applied to Messrs. Sperling & Co. for stock to the nominal amount of £200, and paid £190 therefor.

It is unnecessary to set out the respects in which the prospectus is alleged to have contained untrue statements It suffices to say that the evidence adduced by the respon-

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dent affords *prima facie* ground for regarding the prospectus as in several material respects untrue and misleading.

Shortly after the issue of the debenture stock the Northumberland Co. made itself master of all the liquid resources of the Workman Co., including investments of the value of £1,600,000 and the proceeds of the sale or issue of the debenture stock, and applied these resources directly or indirectly in paying for the shares of the Workman Co. and the shares of the other companies which it had acquired and for other purposes of the Northumberland Co.

These financial methods, combined with the industrial depression which ensued, eventually reduced both the Workman Co. and the Northumberland Co. to a condition in which the debenture stockholders of the Workman Co. could find little comfort. The value of the debenture stock fell to a low figure.

The respondent, who retained his debenture stock, launched this action on the 20th January, 1926.

The action came for trial on the 27th September, 1927, before the Rt. Hon. Mr. Justice Brown sitting with a special jury and was before the Court for 20 days.

On the 21st November, 1927, at the close of the respondent's case the learned Judge, upon the application of the first appellants and of the defendant Sir John Esplen, held that there was no case to go to the jury against the applicants in respect of the first cause of action (namely the case of fraudulent misrepresentation in the prospectus) on the ground that there was no evidence connecting the applicants with the making of the statements alleged to be false. The learned Judge accordingly dismissed the action with costs as against the applicants, and this conclusion was embodied in a certificate of the Registrar dated the 24th November, 1927.

On the 24th November, 1927, the learned Judge further ruled (1) that there was no evidence to go to the jury against any of the defendants on the third cause of action, namely, the charge of conspiracy, and (2) that on the second cause of action the only evidence pointed to Messrs. Sperling & Co. being the purchasers of the debenture stock from the Workman Co., and that upon the

true construction of section 84 of the Companies (Consolidation) Act, 1908, a prospectus by a purchaser offering the debenture stock for sale was not within the section. The learned Judge, therefore, also withdrew the second cause of action from the jury.

The result of the learned Judge's conclusions was that the action could only proceed against the second appellants upon the first cause of action, namely, fraudulent misrepresentation.

The action, however, did not proceed by reason of the events which I will next mention. On the 28th November, 1927, the second appellants applied to amend their defence by lodging in court, with a denial of liability, the sum of £130 in satisfaction of the first cause of action. Their application was allowed upon the terms of their paying the respondent his general costs of action, including the costs of the issues arising out of the first cause of action. Thereupon the respondent intimated his intention to accept the sum lodged in satisfaction of the matters in respect of which it was lodged.

By the formal judgment, which was dated the 28th November, 1927, the second appellants were ordered to pay the costs, the payment of which had been made a condition of their leave to amend, the £130 was ordered to be paid out to the respondent, the jury was discharged, and judgment was given for the second appellants on the second and third causes of action with the costs of action on the issues arising thereon and certain directions for the set off of costs were given.

On the same 28th November, 1927, the respondent was given leave to appeal against the decision of Mr. Justice Brown given on the 21st November, 1927, whereby the action so far as it related to fraudulent misrepresentation had been dismissed as against the first appellants and the defendant, Sir John Esplen.

On the 10th January, 1928, the respondent gave notice of appeal against the decision of Mr. Justice Brown of the 21st and 24th November, 1927, in favour of the appellants.

The notice of appeal in effect asked to have the decisions set aside upon the grounds (1) that there was evidence to go to the jury against the first appellants and

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Sir John Esplen upon the first cause of action, (2) that the learned Judge misdirected himself in holding that Messrs. Sperling & Co. were purchasers of the stock, (3) that the learned Judge misdirected himself in law in holding that section 84 of the Companies (Consolidation) Act, 1908, did not apply to the prospectus, and (4) that there was evidence to go to the jury against all the defendants on the third cause of action. The notice of appeal further asked for the following relief: (1) that the decision of the 21st November, 1927, in favour of the first appellants and the defendant, Sir John Esplen, in respect of fraudulent misrepresentation be set aside and an order be made against the first appellants and the defendant, Sir John Esplen, for payment of the respondant's costs of appeal in respect of the matters aforesaid and of his costs of the trial in respect thereof rendered abortive by reason of the application which led to the decision of the 21st November, 1927, or alternatively an order be made against the second appellants and the Northumberland Co. for payment to the respondent of any costs he might be liable to pay to the first appellants and the defendant, Sir John Esplen; (2) That as regards the second cause of action the judgment of the 28th November, 1927, be set aside with costs of the appeal and of the action in respect thereof and that a new trial be ordered; and (3) That as regards the third cause of action also the judgment of the 28th November, 1927, be set aside with costs of the appeal and of the action in respect thereof and that a new trial be ordered.

The appeal came on for hearing on the 28th February, 1928, and was heard for 16 days. During the hearing of the appeal proceedings were by consent discontinued against the defendant, Sir John Esplen.

In the result the Court of Appeal came to a unanimous conclusion upon all points except one. The points upon which they were unanimous were: (1) That the acceptance by the respondent of the money paid into Court discharged all the defendants in respect of the first cause of action; (2) that the learned trial Judge was wrong in withdrawing from the jury each of the following matters:—(a) the case against the first appellants upon the first cause of action; (b) the question whether Messrs.

Sperling & Co. were in fact purchasers of the debenture stock from Workman Co.; and (c) the case against all the defendants on the third cause of action; (3) that the learned Judge was right in his construction of section 84 of the Companies (Consolidation) Act, 1908; and (4) that the measure of damages upon the third cause of action was wider than that upon the first cause of action, and that a new trial should be allowed upon the third cause of action.

The Lord Chief Justice and Lord Justice Best further held that the measure of damages on the second cause of action was wider than that on the first cause of action and that a new trial should also be allowed upon this head. On the other hand, Lord Justice Andrews was of opinion that the measure of damages was the same in these two causes of action, and that no new trial in this respect should be allowed.

The formal order of the Court of Appeal was dated the 14th May, 1928, and as ultimately amended on the 26th June, 1928, set aside the decisions of the trial Judge complained of. It further declared the respondent entitled to his costs of action referable to all three causes of action up to and including the 24th November, 1927, as against the first and second appellants, and from the 24th November, 1927, up to and including the 28th November, 1927, as against the second appellants, and ordered a new trial of the second cause of action against the first appellants and the appellants, Sir E. M. Edgar and R. A. Workman, and a new trial on the third cause of action against all the appellants. The appellants were ordered to pay the costs of the appeal.

The conclusions of the Court of Appeal are called in question before your Lordships' House by all the appellants.

The first question is whether the view of the trial Judge or that of the Court of Appeal upon the evidence adduced at the trial in support of the respondent's case is the right one. A full and critical examination of that evidence has taken place before your Lordships. Having regard to the fact that actions by others who applied for debenture stock upon the prospectus of the 11th February, 1927, are still pending it is well to abstain from any

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further comment upon the evidence. Suffice it to say that I concur in the observations upon the evidence of the noble and learned Viscount on the Woolsack, and I am satisfied that the evidence if uncontradicted or unexplained is such that upon it a jury might without perversity have found a verdict unfavourable to the appellants in respect of each of the alleged causes of action. In my judgment, therefore, the Court of Appeal in this respect came to a correct conclusion. It is admitted by the respondent that his acceptance of the money lodged in Court debars him from proceeding against the first appellants on the first cause of action, but the question remains whether, having regard to that acceptance, any new or further trial should have been ordered by the Court of Appeal in respect of the second cause of action or of the third cause of action.

The answer to this question is, in my opinion found when the form of the statement of claim is examined.

As I read the statement of claim the respondent alleges only one matter of damage though he bases himself upon three alternative legal grounds. Having accepted the £130 in satisfaction of his damage upon the footing of one of the three alternatives he ought not, in my opinion, to be allowed to proceed upon the other alternatives as though he had founded upon them separate claims for damages.

In this view of the matter it is unnecessary for your Lordships to consider the nature of the action for conspiracy, a topic much debated in the course of the case. It will, however, be proper notwithstanding the conclusion already indicated to pass an opinion upon section 84 of the Companies (Consolidation) Act, 1908, which gave rise in one respect to a difference of judicial opinion in the Court of Appeal of Northern Ireland.

I agree with the learned Trial Judge and the Court of Appeal as to the general scope of the section, but, on the question of the measure of damages, I prefer the view of Lord Justice Andrews to that of the majority of the Court of Appeal.

In my opinion, the effect of the section is to create a statutory tort having within the ambit prescribed by the section the same characteristics and consequence as the

corresponding common law tort based on misrepresentation except that the complainant is relieved of the necessity of alleging and proving fraud. I agree with Lord Justice Andrews that it would be strange if the measure of compensation for what morally speaking is the less serious offence should be held to be greater than the measure of damages for the graver offence.

LORD TOMLIN.

Further I think that the order of the Court of Appeal was wrong in the matter of costs. I cannot hold the view that it was proper to make an order for the payment of costs against parties in respect of issues which as against them had never been tried.

In the result, therefore, I think that the order of the Court of Appeal should be varied in the manner indicated by the motion made by the noble and learned Viscount upon the Woolsack, and that there should be no costs of the appeal to your Lordships' House.

LORD THANKERTON.

LORD THANKERTON: My Lords, I concur in the judgment of the noble and learned Viscount upon the Woolsack.

Questions put:—

That the order appealed from be reversed.

The Not Contents have it.

That the order appealed from be varied by discharging so much of it as directs a new trial and payment of the costs and, subject to such variation, be affirmed.

The Contents have it.

That the appellants in both appeals do pay to the respondent half his taxed costs of the appeal to the Court of Appeal in Northern Ireland, and that the respondent do pay to Sir George Clark, George Ernest Clark and Charles Edward Allan the costs of the action referable to the issue of deceit, and do recover such costs over against the other defendants, and on the claims for conspiracy and under section 84 of the Companies (Consolidation) Act, 1908, judgment be entered for the defendants without costs.

The Contents have it.

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That each party do bear and pay their own costs of the appeal to this House.

The Contents have it.

Agents for the appellants Sir George Smith Clark, Bart. and George Ernest Clark : *Blyth, Dutton, Hartley & Blyth* for *Robert Wallace.*

Agents for the appellant Charles Edward Allan : *Nicholson, Graham & Jones,* for *McLean & Son.*

Solicitors for the appellants Sir Edward Paulet Stracey and others (formerly carrying on business as Sperling & Company), Sir Edward Mackey Edgar and Robert Alfred Workman : *Deacon & Co.*

Agents for the respondent : *Carter & Bell,* for *T. Erskine Alexander.*

IN RE CINNAMOND PARK AND COMPANY, LIMITED (1).

Ch.D. 1929.

Oct. 28, Nov. 3.

(1929. No. 125.)

Company—Winding up—Sums allotted to directors—Whether "sums due to members of company in character of members by way of dividends, profits or otherwise"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 123, *sub-s.* 1 (vii).

In October, 1907, R. B. P., J. G. M., I. J. M., R. G. S. and J. H., five directors of C. P. & Co., Ltd., entered into agreements, under which they became employees of the Company, each receiving a salary and one fifth of the net profits. The agreements were to remain in force for ten years, unless terminated as therein provided.

R. B. P., one of these directors, being unable to attend to the business of the Company, entered into a new agreement, dated 14th June, 1911, whereby his prior agreement was annulled, and it was agreed that he and his personal representatives should continue to be paid one fifth of the net profits, so long as he or they retained the share interest in the capital of the Company, which he then held, in one undivided holding.

The agreements with the other directors were not cancelled, but, by supplemental agreements, it was provided that if they gave up their employment with the Company, they also would continue to receive their respective one fifth shares of the net profits, so long as their respective shares in the capital of the Company were retained in one holding.

J. H. died in 1913; R. G. S. died in 1914; R. B. P. died in 1919. In the year 1920 £3,000 was appropriated in respect of the directors' shares of the net profits, payable under their agreements, and was placed to the credit of a directors' remuneration account. This sum was subsequently divided into five sums of £600 and placed to the credit of their respective deposit accounts with the Company.

The Company had power under its Articles of Association to fix the remuneration of directors, and in pursuance of a resolution passed at the annual meeting of the Company held on 11th June, 1920, a sum of £3,500 was placed at the disposal of the managing directors, then I. J. M. and J. G. M. and two others, as a bonus for the year 1919-20. Of this sum, £1,300 was allotted to I. J. M. and £1,300 to J. G. M. These amounts were, however, not paid out, but were retained by the Company and placed to the credit of their respective deposit accounts in the year 1925.

The Company, having become insolvent, went into voluntary liquidation in the year 1928, and up to that time the five sums of £600 and the two sums of £1,300 had not been paid to the persons who claimed to be entitled to them.

(1) In the Chancery Division before Wilson J.

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1923.

IN RE CINNAMOND PARK & CO., LTD.

Held, that the sums of £600, claimed by the personal representatives of R. G. S. and R. B. P. and J. H. respectively, were sums due to members of the Company in their character of members by way of dividends, profits or otherwise, within the meaning of section 123, sub-s. 1 (vii) of the Companies (Consolidation) Act, 1908, and accordingly the persons claiming these sums were not entitled to compete with the ordinary creditors of the Company in respect thereof.

And ***Held***, that I. J. M. and J. G. M., having continued their employment with the Company until after 11th June, 1920, the sums of £600 claimed on their behalf were sums payable to them under their contracts of employment, and not in their character of members of the Company, and accordingly did not come within the provisions of section 123, sub-s. 1 (vii).

And ***Held***, that the sums of £1,300 due to I. J. M. and to the personal representatives of J. G. M. respectively, were sums given to them, not by agreement, but under the Articles of Association, and consequently were not payable to them in their character of members within the meaning of section 123, sub-s. 1 (vii).

In re Leicester Club and County Racecourse Co., Ex parte Cannon [30 Ch. D. 629] dissented from.

In re Dale and Plant [43 Ch. D. 255] followed.

SUMMONS brought by James Oswald Wilson, the liquidator of Cinnamond Park & Co., Ltd., for the determination of questions arising on the distribution of the assets of the Company.

The Company was formed on 28th September, 1907. The Memorandum of Association was signed by R. B. Park, James G. Marks, Robert H. Saunderson and James Harper, who were appointed the first directors of the Company, and also by Mrs. Jane C. Saunderson and Mrs. Sophie Marks. Article 95 of the Articles of Association provided that the directors should be entitled to set apart and receive for their remuneration, in each year, such sum of money as the Company in general meeting might determine. From 1907 till 1920 no such sum was set aside, but, on 30th October, 1907, the five directors entered into agreements with the Company, under which they were employed by the Company in various capacities, and in addition to their salaries in respect of such employment, each director was to receive one fifth of the net profits of the business, after discharging all outgoings and paying a dividend of five per cent. on the the subscribed capital of the Company. All these agreements were to remain in force for ten years from 1st May, 1907, unless rescinded,

In the year 1911 R. B. Park became ill, and, being unable to attend to the business of the Company, entered into a new agreement dated 14th June, 1911, whereby his prior agreement was annulled, and the Company agreed to continue to pay him and his executors and administrators, one fifth of the net profits, so long as he, or his legal personal representatives, or any devisee or assignee of his, should retain the share interest in the capital of the Company, which he then held, in one undivided holding. At the same time the other four directors entered into supplemental agreements by which their original agreements of 30th October, 1907, were merely amended by providing that, if they gave up their employment with the Company, they should continue to be paid their one fifth shares of the net profits upon terms, similar to those contained in R. B. Park's new agreement. In the meantime these four directors continued to receive their salaries as employees of the Company.

James Harper died on 17th July, 1913; Robert H. Saunderson died on 9th August, 1914, and R. B. Park died on 28th April, 1919.

At the annual meeting of the Company, held on 11th June, 1920, the report of the directors, appropriating the sum of £3,000 in respect of their shares of the net profits under the agreements, was adopted. This sum was, however, not paid out, but was credited to a directors' remuneration account and remained unpaid until 16th March, 1925, when it was divided into five sums of £600, and entered in a private ledger, *viz.* :—

Directors' Additional Remuneration A/c. Dr. £3,000.

1925.		
March, 16.	To Reps. R. H. Saunderson, decd. ...	£600
	Exors. R. B. Park, decd. ...	600
	James G. Marks ...	600
	I. J. Megaw ...	600
	Reps. Jas. Harper, decd. ...	600

At the same meeting in the year 1920, in addition to the setting aside the said sum of £3,000, a further resolution was passed to the effect that a sum of £3,500 should be placed at the disposal of the managing directors as a

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bonus for the past year, 1919-20. Out of this sum, £450 was paid to Thomas Marks and £450 to S. H. Megaw, who were then directors of the Company. These payments were made on 14th May, 1920, and on the same day cheques were issued to James G. Marks and Isaac J. Megaw, each for £1,300, making up the balance of the sum of £3,500. These latter cheques were not cashed, and on 16th March, 1925, they were cancelled, and the sums of £1,300 were placed to the credit of deposit accounts in the names of James G. Marks and Isaac J. Megaw respectively. In the year 1927 James G. Marks died. When, in the year 1928, the Company, having become insolvent, went into voluntary liquidation, the five sums of £600 and the two sums of £1,300 had not been paid to the persons claiming to be entitled to them.

The liquidator accordingly sought the decision of the Court on the following questions:

1. Whether the five sums of £600 were moneys due to members of the Company in their character as members by way of dividends, profits or otherwise, within the meaning of section 123, sub-s. 1 (vii) of the Companies (Consolidation) Act, 1908, or whether the claimants were entitled to prove against the Company for the said sums in competition with the general creditors.

2. Whether the two sums of £1,300 were validly voted to the directors, and if so, whether they came within the provisions of section 123, sub-s. 1 (vii).

Black K.C. for the liquidator:—

Fees to which directors have contractual rights do not come within section 123, but fees which are voted to them as gratuities are sums payable to them in their character of members within the meaning of the section. This distinction can be illustrated by comparing *In re Dale and Plant* (1) with *In re Leicester Club and County Racecourse Company: Ex parte Cannon* (2). In the former case the director had a contractual right to the fees which he claimed, and accordingly it was decided that he was entitled to compete with the ordinary creditors of the Company. *In Ex parte Cannon* (2) the director's claim

(1) 43 Ch.D., 255 (2) 30 Ch.D. 629

was not based on a contractual right, and was held to be postponed to the claims of outside creditors. If this decision is good law it should govern the present case.

[He also referred to *Re New British Iron Co.; Ex parte Beckwith* (1), *In re A.1 Biscuit Co.* (2), *In re Dover Coalfields Extension, Ltd.* (3) and *In re The Iceland Sulphur and Copper Company (Limited)* (4).]

Murphy K.C. and *Warnock* for the respondents:

Under Article 95 of the Articles of Association the Company is authorized to fix the remuneration of directors. When a sum is fixed under this Article it is remuneration, and cannot be described as a gratuity. Moreover, the agreements made in the year 1907 are agreements for the employment of the directors, and under these agreements the directors have contractual rights to their salaries and shares of the profits.

The argument advanced on behalf of the liquidator depends upon *In re Leicester Club and County Racecourse Co.; Ex parte Cannon* (5), but this decision is not consistent with subsequent authorities. This view is expressed by the author of Palmer's Company Law (13th edition) at page 189, while it is stated, in Stiebel's Company Law (2nd edition) at page 440 (note), that *Ex parte Cannon* (5) would appear to be over-ruled by *Ex parte Beckwith* (1), *In re Dale and Plant* (6), *In re A.1 Biscuit* (2) and *In re Dover Coalfield Extension* (3).

Cur. Adv. Vult.

WILSON, J.: This Limited Company was formed on 28th September, 1907, to acquire and take over the business of Cinnamond Park & Company, and five gentlemen, R. B. Park, James G. Marks, Isaac J. Megaw, Robert H. Saunderson and James Harper, and the wives of two of them, *viz.*, Mrs. Jane C. Saunderson and Mrs. Sophie Marks, signed the Memorandum of Association. The capital was £24,000, divided into 2,400 shares of £10 each. Mr. Park had 1,200 shares and each of the other gentlemen had 300, save Mr. Marks and Mr. Saunderson,

(1) [1898] 1 Ch. 324
(2) [1899] W.N. 115
(3) [1908] 1 Ch. 65
(4) 2 T.L.R. 509
(5) 30 Ch.D. 629
(6) 43 Ch.D. 255

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who each had 299 and their respective wives one share each. By Article 81 of the Articles of Association the five gentlemen were appointed the first directors of the Company, and Article 95 provided that the directors should be entitled to set apart, and receive for their remuneration in each year, such a sum of money as the Company in general meeting should from time to time determine. From 1907 till 1920, so far as I have been able to ascertain, no sum was set aside by any general meeting for the remuneration of the directors. In fact, they were paid otherwise and in other capacities. On the 30th October, 1907, five separate agreements (of which we have three) were entered into between the Company and each of these gentlemen.

By his agreement Mr. James G. Marks was employed as general manager of the Company's business save that he was not to interfere in the financial matters, and was to be under the control of the directors. His salary was to be £1,000 a year payable from 7th February, 1907, and one fifth of the net profits of the business, which should remain after discharging all outgoings and making all necessary provision for bad debts and depreciation and paying a dividend of five per cent. per annum on the subscribed capital of the Company for the time being. The auditor was to ascertain the net profits, and the decision of the auditor as to the net profits and the proportion thereof which Mr. Marks was to get was to be final and binding on all parties. The agreement was for ten years. Mr. R. B. Park entered into a similar agreement, save that he was employed to superintend and conduct the bookkeeping and financial management of the Company, and was to be under the control of the directors, and was to get a salary of £560 and one fifth of the net profits as above. Mr. Saunderson had a similar agreement as cashier and accountant at a salary of £360 a year and one fifth of the net profits as above. I presume the other two directors had similar agreements as employees of the Company in some capacity other than as directors. All these agreements were to last for ten years from 1st May, 1907, unless sooner terminated as therein provided. In 1911 Mr. R. B. Park became ill and unable to attend to the business, and a fresh agreement was entered into with

him on the 14th June, 1911, and by that agreement the prior agreement of 30th October, 1907, was annulled, and the Company agreed to pay Mr. Park and his executors and administrators, so long as he, or his legal personal representatives, or any devisee or assignee of his, should retain the share interest in the capital of the Company which he then held and in one undivided holding, one fifth of the net profits of the business of the Company which should remain after discharging all outgoings and making all necessary provision for bad debts and depreciation and paying a dividend of five per cent. per annum on the subscribed capital of the Company for the time being. The auditor was to ascertain the net profits and the amount of the one fifth thereof payable to Mr. Park or his representatives, and the auditor's decision was to be final. The object of this was to keep the shares and control of the Company in the same hands or families as long as possible. Each of the other directors thought a similar provision should be made in his case, and similar agreements with a slight difference were made with each of them on the same date. The difference is shown by the agreement with Mr. Marks. The original agreement of 30th October, 1907, was not annulled, but was only amended, so that so long as James G. Marks or his legal personal representative or his devisee or assignee should retain his share interest in the capital of the Company, which he then had, and in one undivided holding, he or his legal representative or his assignee or devisee should be entitled to receive from the Company the one fifth of the net profits left after providing for debts, &c., and paying five per cent. on the paid up share capital of the Company. The auditor was to ascertain the net profits and the amount payable to Mr. Marks, and his decision was to be final. The other three directors had similar agreements. It would seem to me that the result of these latter agreements was that Mr. Park had retired from active participation in the business, and got his one fifth of the net profits entirely under the agreement of 14th June, 1911. The other four directors continued to get their remuneration or salary as employees and also their one fifth of the net profits under the original agreements of 30th October, 1907, and the 1911 agreements provided

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that if they gave up their employment with the Company from any cause they would continue to get paid one fifth of the stated net profits so long as their shares were kept in one holding.

The Company apparently prospered till 1920. The report of the directors for 1920 appropriated a sum of £3,000 in respect of their share of the net profits. This report was adopted by the general meeting of the Company on 11th June, 1920. This £3,000 was not paid out by the Company, but was taken in the books on 15th March, 1920, to a directors' remuneration account as their additional remuneration, and remained unpaid till 16th March, 1925, when it was divided into five sums of £600 each, and each £600 was entered in a private ledger on that date. £600 for reps. R. H. Saunderson deceased; £600 to executors R. B. Park deceased; £600 to James G. Marks; £600 to I. J. Megaw, and £600 reps. James Harper deceased. Each of these sums became due on 11th June, 1920, and none of them has yet been paid. The first question submitted to me is with respect to these five sums. Is each of these sums due to a member of the Company in his character of member by way of dividends, profits or otherwise? If so, they cannot rank as debts against the ordinary creditors of the Company. Now Mr. Park retired in 1911, and died on 28th April, 1919, and his £600 only became payable to his legal representative under the agreement of 14th June, 1911. That is not an agreement for remuneration for work done at all. It is simply an agreement to pay him the extra one fifth of the net profits so long as he keeps his share interest in the capital of the Company in one holding, and in my judgment is only due to his legal personal representative as a member of the Company, and solely in his capacity as such member. Similarly, Mr. Harper died on 17th July, 1913. His employment and remuneration therefore then ceased, and the agreement of 30th October, 1907, came to an end, and his representatives' only claim to this money is under the agreement of 14th June, 1911, and is based solely on his being a member and keeping his shares in one holding. The same result is reached with regard to the representatives of R. H. Saunderson, who died 9th August, 1914. Mr. James G. Marks died

on 7th August, 1927, and, as far as I am aware, he worked as general manager of the Company up to 11th June, 1920, when the £600 became due to him. In my judgment his £600 was payable to him under his contract of employment dated 30th October, 1907, in his capacity as general manager and not in his character of a member by way of dividends, profits or otherwise. Similarly Mr. I. J. Megaw survived the crucial date, 11th June, 1920, and was then working for the Company and is still with it, and this sum of £600 was payable to him under his contract of employment dated 30th October, 1907, and not in his character of a member of the company. I therefore decide that:

(1) the executors of R. H. Saunderson,
(2) the executors of Sara Park, the surviving executor of R. B. Park
and
(3) the surviving executors of James Harper

are not entitled to prove against the assets of the Company, in competition with the ordinary creditors of the Company, and that

(1) the executors of James G. Marks
and
(2) I. J. Megaw

are entitled to prove against the assets of the Company, in competition with the ordinary creditors of the Company, in respect of the several sums of £600 allotted to each of them in the year 1920.

I also find on the evidence, and having regard to the lapse of time, that the executors of James G. Marks and Mr. I. J. Megaw are each entitled to prove against the assets of the Company and in competition with the ordinary creditors of the Company in respect of the sum of £1,300, being the balance of the bonus determined by the general meeting of the Company to be set apart and received by the directors for the services in that year.

In my opinion, although the agreement between Mr. Marks and the Company appointed him general manager of the Company at a salary of £1,000 and one fifth share of the net profits subject to the control of the directors, this £3,500 given to the managing directors by the general meeting on 4th June, 1920, was given to them, not under

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the agreement, but under the Articles of Association. I, therefore, have to make up my mind between the two cases cited to me—*In re Leicester Club & County Race-course Company; Ex parte Cannon* (1), decided by Pearson, J., and *In re Dale and Plant* (2), decided by Kay, J., and the subsequent cases decided by Wright, J. I do not think any of these cases is similar to the first point I have decided in this case, which I decide solely on the facts and documents; but on the latter point, the two sums of £1,300 are moneys given to directors under Article 95, which left such moneys altogether in the discretion of the general meeting, with no prior contract with the directors for any sum, and is apparently identical with the case of *Ex parte Cannon* (1). However, the reasoning of Kay, J., is destructive of Pearson, J.'s, judgment, and money voted by a general meeting of a company as the remuneration to which directors are entitled for services rendered to a company is not in my judgment a sum due to a member of a company in his character of a member by way of dividends, profits or otherwise. It is, on the other hand, a sum voted, and therefore due to a director of a company for good work done by him, not as a member, but over and above being a member, as director and manager of the company.

However, all these sums became due at latest on 4th June, 1920, and are not yet paid. No one has mentioned to me the Statute of Limitations. I am willing to decide now whether these claims are, or are not, barred by the Statute of Limitations, if Counsel choose to argue the point, but if not I must allow the liquidator on behalf of the ordinary creditors of the Company to raise any other defence to the proofs I have allowed such as the Statute of Limitations.

As all the claimants appeared together and some have failed, I allow the respondents half of the taxed costs of this application out of the assets, and allow the liquidator his costs when taxed and ascertained.

Solicitor for the liquidator: *Robert Wallace.*

Solicitors for the respondents: *White, McMillan & Wheeler.*

J. D. C.

(1) 30 Ch.D. 629 (2) 43 Ch.D. 255

WOODS v. DAVISON (1).

C.A. 1929.

Feb 12

Negligence—Contributory negligence—Findings of jury—Cause of injury.

The plaintiff sustained injuries as the result of a collision which occurred between his motor bicycle and the defendant's motor car. The plaintiff's case was that, while riding his bicycle round a left-hand bend, the defendant's car, which was coming round the bend in the opposite direction, and on the wrong side of the road, collided with his machine. The defendant contended that his car was on its proper side of the road, and that it was by reason of the fact that the plaintiff was on the wrong side that the accident took place.

The jury found that the plaintiff was on his proper side of the road when the collision happened; that the defendant was guilty of negligence, and that the plaintiff was guilty of contributory negligence. On being sent back to consider the questions further, the jury found that the defendant's negligence caused the accident, and they assessed a sum for damages. In answer to a supplemental question the jury found that the plaintiff's contributory negligence consisted in not keeping a proper look-out and having no light on his machine.

On the answers of the jury the Trial Judge abstained from giving judgment for either party, and left the parties to move for judgment. Both the plaintiff and the defendant applied to the Court of Appeal for judgment, the plaintiff asking alternatively for a new trial.

Held by the Court of Appeal (Best, L.J., dissenting) that on the findings of the jury the plaintiff was not entitled to judgment or to a new trial, and judgment was accordingly entered for the defendant.

MOTION for judgment or a new trial.

The action was brought by the plaintiff to recover damages for personal injuries caused by the alleged negligence of the defendant's agent in the driving, control and management of a motor car. The defence included a plea of contributory negligence.

The action was tried before Moore, L.C.J., and a special jury of the City of Belfast on 15th November, 1928.

The following summary of the facts is taken from the judge's report:—

The plaintiff's case was that whilst riding a motor cycle round a left-hand bend, on the road leading from Ardress to Portadown, on 12th August, 1925, the defendant's motor car, coming out from Portadown, wrongfully came

(1) In the Court of Appeal before Andrews and Best, L.J.J., and Brown, J. (The case had previously been argued before Andrews and Best, L.J.J., but their Lordships directed it to be re-argued before a full Court).

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across the road and struck him. The defendant, on the other hand, maintained that, while going out from Portadown, the plaintiff came across the bend to his wrong side, and ran into his motor car.

The questions submitted to the jury and the answers thereto were as follows :—

1. Was the plaintiff on his proper side of the road when the collision happened?—Yes.
2. Was the defendant guilty of negligence?—Yes.
3. Did such negligence cause the accident?—Yes.
4. Was the plaintiff guilty of contributory negligence?—Yes.
5. Damages (if any).—£400.

Supplemental question :—

In what respect was the plaintiff guilty of contributory negligence?—Not keeping a proper look-out, and having no light on his machine.

Chambers for the plaintiff :—

The test to be applied is whether the defendant's negligence was the direct cause of the accident. The real question is,—on which side of the road was each party driving? *Chaplin* v. *Howes* (1). It is clear that in the present case the plaintiff was on his proper side of the road, and that the accident was caused by the defendant cutting the corner. The effect of the finding of contributory negligence on the part of the plaintiff is negatived by the finding on the supplemental question. The contributory negligence of which the plaintiff was found guilty had nothing to do with the collision. The jury decided that the defendant was guilty of negligence, and that such negligence caused the accident. The effect of these two findings cannot be displaced by the answer to question 4. It is well settled that negligence will not disentitle a plaintiff to recover, unless it be such that without it the harm complained of would not have happened. *British Columbia Electric Railway Co., Ltd.*, v. *Loach* (2). The dictum of Lord Sumner and his quotation from the judgment of Angin, J., in *Brenner* v. *Toronto Rly. Co.* (3) are particularly applicable to the present case.

(1) 3 C. & P. 554.
(2) [1916] 1 A.C. 719.
(3) 13 Ont. L.R. 423.

The plaintiff, if not entitled to judgment, is at least entitled to a new trial by reason of the fact that the findings of the jury are conflicting.

[He also referred to *Cruden* v. *Fentham* (1), and to the judgment of Lord Selborne in *Spaight* v. *Tedcastle* (2).]

Murphy K.C. (with him *Lowry K.C.* and *Sheil*) for the defendant.

The present case can be distinguished from *British Columbia Electric Railway Co., Ltd.*, v. *Loach* (3), in which the jury found that notwithstanding the negligence of the deceased, the defendants could have avoided the accident.

When an accident occurs as the result of the combined negligence of the plaintiff and the defendant, the plaintiff's claim must fail even though the preponderance of blame lies upon the defendant. This principle is laid down by O'Connor, L.J., in *Neenan* v. *Hosford* (4). In *Reynolds* v. *Tilling* (5) the jury found that the plaintiff was guilty of negligence, and that the defendant was guilty of contributory negligence, but were unable to agree as to whether the defendant could have avoided the accident by the use of reasonable care. Upon these findings Walton J. entered judgment for the defendant. This decision was affirmed by the Court of Appeal (6).

[He also referred to *Butterly* v. *Drogheda* (7) and *Wakelin* v. *London and South Western Rly. Co.* (8).

Chambers (in reply):—

The onus of proving contributory negligence rests upon the defendant. There is no evidence that either of the two omissions on the part of the plaintiff, mentioned in the jury's answer to the supplemental question, contributed to the accident.

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ANDREWS, L.J.: In this case a motor bicycle ridden by the plaintiff and a motor car driven by the defendant's son came into collision with one another at what was to the plaintiff a left-hand bend on the road leading from Moy to Portadown. As a result the plaintiff sustained

(1) 2 Esp. 685.
(2) 6 A.C. 217 at p. 219.
(3) [1916] 1 A.C. 719.
(4) [1920] 2 I.R. 258 at p 308.
(5) 19 T.L.R. 539.
(6) 20 T.L.R. 57.
(7) [1907] 2 I.R 134.
(8) 12 A.C. 41.

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serious injuries and damage, measured by a special jury of the City of Belfast at four hundred pounds. At the trial the Lord Chief Justice submitted certain questions to the jury with which I shall deal later, and to which no exception was taken by either party. On the answers of the jury the learned Lord Chief Justice abstained from giving judgment for either party, and left the parties to move for such judgment as they respectively might be advised. Both parties have, accordingly, applied to this Court for judgment on the findings of the jury, and the plaintiff has asked, alternatively, for a new trial.

The accident occurred on 12th August, 1925, probably at about 10 p.m. There is a controversy as to whether it was after lighting-up hour, but this would not necessarily determine the issue as to whether it was negligent not to have lamps lighted. On a dark cloudy night it may sometimes be negligent not to light up before lighting hour. The defendant's car was burning its bright head lights. The plaintiff had no light. His friend Greer, who was following some five minutes behind, had his lamp lighted. Each party alleged the other to have been on his wrong side; and there can be little doubt, both from the report of the learned Judge and his notes, that it was round this issue that the battle waged most fiercely. At the same time there were other allegations on one side or other of excessive speed, failure to blow a horn or to give other proper warning, and failure to keep a proper look out. The plaintiff admitted that he saw no lights on the defendant's car, and that, indeed, he did not see the car until he was struck by the defendant's right hand mudguard.

I shall not refer to any further evidence, as it is not material for our present purposes. The learned Lord Chief Justice at the close of the evidence stated that in addition to the ordinary questions he would take a special finding of the jury as to whether or not plaintiff was on his proper side at the moment of impact. He also said that, in his opinion, there was nothing to show that the defendant could have avoided the consequences of plaintiff's contributory negligence if such were found to exist, as the whole affair was instantaneous, and that, accordingly, he did not propose to put that question. He adds that he

was not asked by either counsel to do so. A draft of the proposed questions was handed to Counsel, who did not ask that any further questions should be put. There was no objection to the learned Judge's charge. The questions submitted to the jury were as follows:—

1. Was the plaintiff on his proper side of the road when the collision happened?
2. Was the defendant guilty of negligence?
3. Did such negligence cause the accident?
4. Was the plaintiff guilty of contributory negligence?
5. Damages (if any).

When the jury returned to Court after a lengthy absence, questions 3 and 5 were not answered, but questions 1, 2 and 4 were all answered in the affirmative. We must, accordingly, conclude that the jury were of opinion that, whilst the plaintiff was on his proper side of the road, he was guilty of contributory negligence in some other respect, and that the defendant was also guilty of negligence, though they were not agreed, or at least had brought in no finding on the question as to whether such latter negligence caused the accident. They were, accordingly, sent back to consider these questions further, and ultimately found that the defendant's negligence did cause the accident, assessing the damages provisionally at four hundred pounds. The Lord Chief Justice reports his surprise at the finding of contributory negligence, and says that he felt it better to put a supplementary question to the jury asking them in what respect the plaintiff was guilty of contributory negligence, to which they replied:—"Not keeping a proper look-out and having no light on his machine." Again the Lord Chief Justice, before discharging the jury, asked counsel if either wished for any further question, but each declined. The Lord Chief Justice adds an expression of his opinion that the finding of the jury on the question of defendant's negligence was perfectly right, and that he would not have found the plaintiff guilty of any negligence. Whilst it is our duty seriously to consider this expression of opinion by the learned Judge, *Webster* v. *Friederberg* (1), and *Devine* v. *Carson* (2), it cannot be allowed, as I pointed out in

(1) 17 Q.B.D. 736. (2) [1929] N.I. 26.

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this latter case, to weigh against the verdict of a jury if supported by proper evidence, *Solomon* v. *Bitton* (1). To hold otherwise would virtually amount to the abolition of trial by jury. Thus in *Gaffney* v. *D.U. Tramway Co.* (2), to which I shall have to refer for other purposes later, the Court of Appeal did not hesitate to enter judgment for the plaintiff on the findings of the jury, though the Trial Judge reported that had he been trying the case without a jury he would, without hesitation, have found that there was no negligence of any sort on the part of the driver of the car, and that the occurrence was caused wholly by the plaintiff's negligence.

The findings of the jury are in no sense perverse. The answers to questions 1, 2 and 3 are in plaintiff's favour, whilst the answers to number 4 and the supplemental question are against him. Further, in my opinion, they are not inconsistent. They amount to this: that the defendant was negligent at least in being on the wrong side of the road; that the plaintiff was negligent in not keeping a proper look-out and in having no light; and that the accident was caused or contributed to by the combined negligence of both parties.

The law of contributory negligence in street accident cases has been so fully expounded in recent years, both by the Privy Council in *British Columbia Electric Ry. Co., Ltd., v. Loach* (3) and by the late Court of Appeal in Ireland in *Gaffney* v. *Dublin United Tramways Co.* (2), *Neenan* v. *Hosford* (4) and other cases, that it would be a vain and profitless task to review again at length that long chain of authority which commences with *Davies* v. *Mann* (5). Judicial opinion has not always been marked by consistency; but for my own part I am inclined to think that undue importance has been attached by some of the learned Judges in the recent cases to what are rather differences of phraseology than of legal principle. It matters nothing to me whether judges, in endeavouring to interpret in plain language to a jury the meaning of the technical phrase the "*causa causans*" refer to the cause by such epithets as "real," "proximate," "direct,"

(1) 8 Q.B.D. 176.
(2) [1916] 2 I.R. 472.
(3) [1916] 1 A.C. 719.
(4) [1910] 2 I.R. 258.
(5) 10 M. & W. 546.

"immediate," "efficient," "effective," "final" or "ultimate"; for by whatever word it be described, all are, I think, aiming at one and the same thing—the last link in the chain of causation. This link may be single or it may be double. It may be welded by the individual efforts of the plaintiff alone, or of the defendant alone, or it may be the workmanship of both combined. In one respect only is the metaphor of the chain imperfect—an initial cause or act of negligence may be of such a character as to continue operative notwithstanding the introduction of other causes down to the moment of the accident, so as to be also an ultimate or even the sole ultimate cause—the *causa causans*—of the accident.

Although the two propositions laid down by Lord Penzance in *Radley* v. *London & North Western Ry. Co.* (1) have been cited with great frequency in judgments in negligence cases, I shall risk their repetition on the present occasion, for they contain practically the whole law on the subject, and express it in simple and intelligible language:—"The first proposition," said Lord Penzance, "is a general one to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The omission of the second proposition from the charge of the learned Judge who presided at the trial was, accordingly, held in *Radley* v. *London & North Western Rly. Co.* (1) to amount to a misdirection.

It may be convenient to explain these two propositions a little more fully by reference to modern authority. *Butterly* v. *Mayor of Drogheda* (2) illustrates the application of the former. The defendants' ser-

(1) 1 A.C. 754 at p. 759. (2) [1907] 2 I.R. 134.

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vants placed an unprotected heap of stones on the highway, over which the plaintiff drove his trap, and was thrown out and injured. The jury found that the defendants were guilty of negligence. They likewise found the plaintiff guilty of negligence; for had he been keeping a proper look out he would not have driven into the heap of stones in broad day-light. But the jury further found that the defendants could, by the exercise of ordinary care, have avoided the consequence of the plaintiff's negligence. On these findings the Trial Judge, Johnson, J., entered judgment for the plaintiff. This was set aside by the King's Bench Division, whose decision was affirmed by the Court of Appeal, on the ground that there was no evidence to support the third finding. The defendants' only act of negligence was in leaving the unprotected heap of stones on the highway; and, when the plaintiff negligently drove on to them, there was no further negligent act or omission on their part. There was nothing which they could have done which would have enabled them to avoid the consequences of the plaintiff's negligence. Lord Penzance's second proposition did not apply; the plaintiff's negligence was the "ultimate" negligence, and he could not recover.

I shall now pass to two cases in which the second proposition applied, and the plaintiff was accordingly held entitled to judgment. In *Gaffney* v. *Dublin United Tramways Co.* (1) the jury negatived excessive speed on the part of the driver of the tram-car, but held that he was negligent in not slackening speed. In other words, they were of opinion that subsequent to the plaintiff's negligence in not keeping a proper look-out there arose a new negligence on the part of the driver, who, when he saw the danger, instead of slackening speed, took his chance, and contented himself with sounding the gong and shouting a warning to the plaintiff, which, owing to partial deafness, he failed to hear. In *British Columbia Electric Ry. Co., Ltd.*, v. *Loach* (2), the plaintiff also succeeded, though in this case there was no new negligence on the part of the defendant's driver arising subsequent to the plaintiffs' negligence. The defendants were guilty of

(1) [1916] 2 I.R. 472. (2) [1916] 2 A.C. 719.

what was called by Lord Sumner a "primary" or "original" negligence in sending out an electric car with a defective brake. The plaintiff was also guilty of "contributory" negligence in not taking precautions to see that the road was clear before stepping on the line; but this latter negligence did not disentitle him from succeeding; for, by incapacitating themselves with a defective brake from exercising such care as would have avoided the result of the plaintiff's negligence, the defendants were guilty of a continuing negligence, which operated to cause the collision down to the very last moment, so that their "primary"' or "original" negligence became also the "ultimate" or "resultant" negligence, the *causa causans* of the accident.

Instances of such continuing negligence are not rare, but *Neenan* v. *Hosford* (1), the only other case to which I propose to refer, shows that the application of the principle has its limitations. The driver of the defendant's bread van was negligent in turning round to push back a loaf of bread; and when he again looked to his front he endeavoured to pull up, but was too late to avoid the consequences of the plaintiff's contributory negligence, which consisted in stepping off the footpath and standing on the street without looking out properly to see the traffic which was coming along it. The King's Bench Division, applying the principle of the *British Columbia Electric Rly. Co., Ltd.*, v. *Loach* (2) set aside the finding of the jury, and held that the driver, having his head turned the wrong way, might be regarded as guilty of continuing negligence causing the accident, no matter how gross was the negligence of the plaintiff, as his incapacity to avoid the collision was self-created. The Court of Appeal, Sir James Campbell, C., and O'Connor, L.J. (Ronan, L.J., dissenting) restored the verdict and judgment for the defendant. The difference between the *British Columbia Electric Rly. Co., Ltd.*, v. *Loach* (2) and *Neenan* v. *Hosford* (1) was clearly pointed out by Sir James Campbell, where he says that in the former case the contributory negligence of the deceased was spent while the electric car was still fifty yards away and capable of being stopped by an effective brake, and so it could

(1) [1920] 2 I.R. 258. at p. 273. (2) [1916] 2 A.C. 719.

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not be the ultimate cause; whereas, if there was anything beyond doubt in *Neenan* v. *Hosford* (1) it was that the plaintiff's contributory negligence in standing on the street without ever once looking in the direction from which the traffic might be expected was not spent, but continued up to the very last moment of the collision. It was, therefore, the ultimate cause, or, at least, one of the combined ultimate causes of the accident, and in either case the plaintiff could not succeed.

I have perhaps referred to the authorities at greater length than I had originally intended; but I trust that by referring to and contrasting them in the manner which I have done, I have explained more successfully than I could have otherwise done, the underlying principles of this branch of the law.

From what I have said, it would appear to be clear that there are only two ways in which a finding of contributory negligence against a plaintiff may be circumvented, and a verdict entered for the plaintiff. The first of these is if the jury further find on proper evidence, in the words of the well-worn formula, that the defendant could by the exercise of reasonable care and skill have avoided the consequences of the plaintiff's negligence, or as Lord Lindley more clearly put it in *The Bernina* (2), that, notwithstanding the plaintiff's negligence, the defendant could, by taking reasonable care, have avoided the collision. I refain from expressing any opinion as to whether such a finding might have been justified by the evidence in the present case. It is enough for me that the learned Lord Chief Justice considered that there was no such evidence, as in his opinion "the whole affair was instantaneous"; that he intimated to counsel on both sides that he did not propose to put that question to the jury; and that counsel not only agreed to that course at the trial, but have not sought in terms to argue before us that any such question should have been put. On the contrary, in his notice of motion, the plaintiff set out as one of the grounds upon which he relied that the form of the first three questions submitted to the jury made it unnecessary for this further question to be left to them. In

(1) [1920] 2 I.R. 258. (2) 12 P.D. 58, at p. 85.

my opinion, the plaintiff must be held bound by the course of the trial and of the hearing before us.

The second way of answering a finding of contributory negligence is by establishing that there is no proper evidence to support it, and that it should, accordingly, be set aside. This is the line of argument which counsel for the plaintiff has attempted to pursue. He admits, as he is bound to do, that it may have been negligent for the plaintiff to have no light, and that it may have been negligent for him to keep such a poor look-out that he never saw the car with its approaching head lights until he was struck. These were, he agrees, acts of omission on the part of the plaintiff which the jury might hold to amount to negligence, but such negligence was only, as he characterises it, "negligence in the air," i.e., negligence which did not in the proper legal sense cause or contribute to the accident. In a word, he submits that whilst the jury would have been justified in finding the plaintiff guilty of negligence, there was no evidence upon which they could properly find contributory negligence. Whether this view is correct or not is the real issue, which on the case as presented we have to determine.

In considering this question, we must in the first place assume that the jury were properly instructed by the Lord Chief Justice as to the meaning of contributory negligence, for no objection was taken to his charge. The true significance of the expression as containing a causal element should further have been borne in on their minds by the fact that no separate causation question was submitted to them in reference to contributory negligence such as that which was put to them in reference to the defendant's negligence.

From the opening of the argument I have felt that the plaintiff's task was a most difficult one. It is not for us to say—neither do I wish to imply—what we would or might have done had we been in the place of the jury at the trial. We must not usurp their functions. Their duty was to determine the issue on the weight of evidence and the balance of probabilities. Our duty, on the other hand, is merely to consider whether there was proper evidence to support their finding. I have given the matter much anxious thought, but the more I have thought

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of it the more confirmed I have become in the view that the jury were perfectly entitled on the evidence to hold that the plaintiff's failure to keep a proper look-out and to carry a light contributed to the happening of the accident. It seems to me to be a primary duty of anyone using the public highway, whether he be a motorist, the driver of a horse-drawn vehicle, or a humble pedestrian, to keep a proper look-out and watch where he is going. In *Gaffney* v. *Dublin United Tramways Co.* (1) Ronan, L.J., said, in the second paragraph of his encyclopædic judgment that "the man" (i.e., the plaintiff) "was guilty of grave negligence, as he admitted that he never noticed the car until it struck him." The plaintiff's evidence was precisely similar in the present case. It seems to me to be likewise the duty of the drivers of all classes of vehicles to carry proper lights after darkness, which will not only be a guide to themselves but a warning to others. Is it to be said that these two fundamental duties can be ignored, or that, at any rate, the failure to carry them out cannot be complained of by a motorist merely because he is travelling on the wrong side of the road? Had the plaintiff in the present case been keeping a proper look-out how could he have failed to see the strong head lights of the approaching motor coming round what was, according to the maps, a very obtuse-angled bend? And the jury were entitled to say that, had he seen the defendant's approaching car when he should have done, the plaintiff might have avoided the accident by pulling further to his own side; for they were not bound by the plaintiff's own estimate of his position of two feet from the margin of the road, and they may have considered that on this broad road he had ample room in which to do so. Further, were not the jury entitled to say that if the plaintiff had carried a light on his bicycle he would in all probability have been seen by the driver of the defendant's car much sooner than he in fact was seen, and that, had this been so, the latter would have had ample time to turn his car the small amount further to his left which would have enabled him to get the right front wheel or mudguard, which struck the bicycle, clear?

(1) [1916] 2 I.R. 472 at p. 492.

These are considerations which have occurred to me—still others may have occurred to the jury to justify them in their finding of contributory negligence. They apparently considered that the negligence of the plaintiff was proximately or directly contributory to, and not merely remotely connected with the accident; and with their finding we cannot possibly interfere.

In my opinion, the defendants are entitled to judgment with costs, including the costs of both motions, which, for purposes of taxation, will be treated as one.

BEST, L.J.: In this case both parties move for judgment on the findings of the jury, and alternatively the plaintiff asks for a new trial.

The action was brought to recover damages for personal injuries to the plaintiff occasioned by the negligence of the defendant's servant or agent in the management of his motor car.

On August the 12th, 1925, plaintiff was proceeding on his motor bicycle towards Portadown, on the Dungannon to Portadown public road, and a collision occurred between his bicycle and a motor car belonging to the defendant driven by defendant's son.

Plaintiff's case was that while riding his bicycle round a left hand bend in the road, and whilst hugging the corner, defendant's car came round on the wrong side, and at the bend suddenly crashed into him.

Defendant's case, on the other hand, was that whilst his car was going out from Portadown, and was rounding the bend on its own proper side, plaintiff was at the bend on the wrong side of the road, and ran his motor cycle into the motor car, thus causing the accident.

It is rightly pointed out by the Lord Chief Justice that both stories could not be true, as, if each party had been on his proper side of the road, there could have been no collision.

It is admitted that plaintiff at the time of the accident had not his lamp lighted, and the reason given by him is that lighting up time had not arrived. Plaintiff's companion, Greer, who was also riding a motor bicycle, and who was some distance behind, having had trouble with his machine, had his lamp lighted as he approached the

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bend in question. At the moment of the accident and for some time previous defendant's car appears to have been fully lighted.

At the close of the evidence for defendant the Lord Chief Justice intimated that, in addition to the ordinary questions, he would take a special finding of the jury as to whether or not plaintiff was on his proper side at the moment of impact. He also said that, in his opinion, there was nothing to show that defendant could have avoided the consequences of plaintiff's contributory negligence if such were found to exist, as the whole affair was instantaneous, and he did not propose to put a question on this point, and he was not asked by counsel on either side to do so. He handed counsel a draft of the questions as they appear in the certificate, and he was not asked to put any other or further questions. In plaintiff's notice of motion it is alleged that there was an agreement—

(1) That liability in the action depended upon the answer given to the first question submitted to the jury; and

(2) That the form of the first three questions submitted to the jury made it unnecessary for a further question to be left to them as to whether, notwithstanding the contributory negligence of the plaintiff, the defendant could, by the exercise of ordinary care and skill, have avoided causing the injury complained of.

At the outset of his argument, Mr. Chambers admitted that he could not rely on any binding agreement such as is alleged in (1) above, but it is clear that counsel on both sides and the Judge regarded the answer to the first question submitted to the jury as almost, if not entirely, the sole factor in determining liability for the accident.

When the jury came into Court after a lengthy absence they had answered only questions 1, 2 and 4. They were told that they ought to answer questions 3 and 5, and, having considered the matter further, they answered these questions as set forth above.

The Lord Chief Justice reports that he had been somewhat surprised at the answer to question 4, and he sent the jury back to find in what respect plaintiff, if on his

proper side of the road, was guilty of contributory negligence. This is how the supplementary question came to be put.

It is to be observed that, in the first instance, the jury did not find whose negligence caused the accident, but, having found the defendant guilty of negligence (see question 2) and the plaintiff of contributory negligence (see question 4), and having the answer to this latter question before them, they find by their answer to question 3 that it was defendant's negligence that caused the accident. Mr. Chambers strongly relied on this as entitling his client to judgment.

In my opinion, there is no evidence to support the jury's finding that the plaintiff was guilty of contributory negligence. It has been found in his favour that he was rounding the corner on the proper side of the road, i.e., on his own left hand side; it is not suggested or found that he was travelling too fast, but it is found against him that he was guilty of contributory negligence by reason of his not keeping a proper look-out, and by not having his lamp lighted. I fail to see how the plaintiff, going round quite close to his own side of what was for him a left-hand bend flanked by a high hedge, and going at a speed which was not excessive, could keep any better look-out than he did, especially as he says that when he got to the bend the car came sailing round, and crashed into him. Nor was the fact that his lamp was not lighted negligence in the circumstances of this case. The reason for having a lamp lighted is to enable the rider to see where he is going, and to give notice of his approach to all whom it may concern. If lighting-up time had really arrived before the accident occurred, and this much I think must be conceded, the plaintiff had still sufficient light to enable him to ride his machine with safety, and from the evidence given by the mother of the driver of the car it is clear that the latter knew that a motor vehicle was meeting him, so that that driver was in possession of all the information which could have been disclosed to him if plaintiff's lamp had been lighted. Failure to have his lamp lighted was, therefore, not in the circumstances negligence on the part of plaintiff contributing to the accident.

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If, however, contrary to my opinion, there is evidence to support the finding of contributory negligence, I am still of opinion that on the findings of the jury the plaintiff is entitled to judgment. The answer to the supplemental question is no more than an amplification of the jury's answer to question 4. Here, then, we have the jury finding that the plaintiff at the time of the accident was on his proper side of the road, that the defendant was guilty of negligence, and the plaintiff of contributory negligence, and, with these findings before them, the jury, having in the first instance failed to answer question 3, on re-consideration find that it was the defendant's negligence which caused the accident. In my opinion, this finding arrived at in this way entitles the plaintiff to have judgment entered for four hundred pounds, with the costs of the trial and of the argument in this Court.

BROWN, J.

BROWN, J.: I find that I cannot agree with the judgment which has been delivered by Lord Justice Best. My views coincide with those expressed by Lord Justice Andrews. In looking at the questions left to the jury by the Lord Chief Justice and the answers thereto, I think there must be a verdict for the defendant.

Mr. Chambers contends that question 1 was the main issue, but the parties did not agree to this, otherwise questions 2, 3 and 4 would have been unnecessary. The jury, by their answer to question 4, found that the defendant was guilty of contributory negligence. Mr. Chambers has attempted to dispose of this finding by shewing that there was no evidence to justify the jury in coming to this conclusion. In my opinion, he cannot succeed in this contention. The jury found that the plaintiff had no light on his machine, and it would seem to me that in driving without a light he incurred a tremendous risk; a good light at night is often a more effective warning of the approach of a car than a horn. I am satisfied that the jury had in mind the fact that if the plaintiff had had a light the defendant could have drawn to his proper side of the road.

Mr. Chambers further contends that question 4 should be taken as the ordinary third question in negligence cases. Questions 2 and 3 represent only the splitting up of

question 2. The Lord Chief Justice had this point in view when charging the jury. He did not tell the jury that question 3 was the old question—"Could the defendant have avoided the plaintiff's contributory negligence?"

I do not see how the plaintiff can get rid of the finding that he was guilty of contributory negligence, and, accordingly, I agree with Lord Justice Andrews that the defendant is entitled to judgment.

Solicitor for the plaintiff: *T. D. Gibson.*
Solicitor for the defendant: *R. M. Cullen.*

J. D. C.

Ch. Div.
1928.
Dec., 17,

C.A.
1929.
April, 29, 30,
May, 2.
June, 13.

MISCAMPBELL v. M'ALISTER.

(1927 No. 32.)

Local Registration of Title—Purchaser for value without notice—Conclusiveness of the register—Easements—Pollution of already polluted stream—Local Registration of Title (Ireland) Act, 1891 (54 & 55 *Vic., c.* 66), *sects.* 25, 29, 30, 34, 45 (*j*), 46, 47 (*g*), 55, 57.

The plaintiff and defendant were the owners of adjoining lands, all of which were purchased under the Land Purchase Acts, and were registered under the Local Registration of Title (Ireland) Act, 1891.

By indenture of 8th March, 1911, the defendant conveyed to the I. S. Co., Ltd., the predecessors in title of the plaintiff, certain lands, together with certain rights, including full power and authority to stop up and divert into the Company's property the water in a stream running down by a fence in "T" Lane. The water in this stream was impregnated with salt from the mines in the neighbourhood, and in 1898, to convey pure water, a pipe had been laid along the bank of the stream.

In 1910 the I. S. Co., Ltd., renewed the pipe, but laid it in the bed of the stream. Any water which passed through the pipe unused had, prior to 1910, flowed on into the "T" Lane stream, but on 1st January, 1910, certain parties who were interested in the use of the water in the pipe, by a document addressed to the I. S. Co., Ltd., consented to the Company joining on a pipe to the existing pipe for the purpose of conveying any surplus water running in the pipe to their works.

By a deed dated 1st September, 1911, the defendant conveyed to the I. S. Co., Ltd., full power and authority to take, use and enjoy all the water issuing and coming from another river or stream shown on a map endorsed on said deed, and to divert between the points marked "X" and "Y," and convey the same water to the portion of the lands marked "A." The lands so acquired by the I. S. Co., Ltd., together with all rights appurtenant thereto, were subsequently purchased by the plaintiff, who on 3rd June, 1923, was duly registered as owner in fee simple.

This deed was registered in both folios, in the I. S. Co.'s folio as an easement, and in the defendant's folio as a burden in terms similar to those contained in the deed, but instead of referring, as was done in the deed, to the water issuing or coming from the river or stream shown on the map endorsed on the deed, the reference was to the river or stream shown on the office maps. The office map was at variance both with the map on the deed and with the facts as they were proved to have existed.

It was contended on behalf of the plaintiff that her rights were determined by the entries on the folio taken in conjunction with the office map, and that under the Local Registration of Title (Ireland) Act, 1891, these entries were conclusive in her favour.

Held, by Wilson, J., that the water in the stream which the plaintiff was at liberty to stop up and divert into her own property included both the water flowing in the pipe in the stream and the water flowing in the bed of the stream;

Held, also by Wilson, J., that the entries on the folio, together with the office map, were conclusive in the plaintiff's favour.

Held, by the Court of Appeal, reversing Wilson, J., (a) that the "water in the 'T' stream" did not include the water flowing in the pipe in the stream, and (b) that the office map was not conclusive as to the extent or character of burdens or easements affecting the lands.

Devoy v. *Hanlon* ([1929] I.R. 246) approved. *Pim* v. *Coyle* ([1907] 1 I.R. 330) considered.

This action was brought by the plaintiff, as successor in title to and purchaser for value without notice from the International Salt Company, Limited, against the defendant for a declaration that the plaintiff was entitled against the defendant to certain water rights, and an injunction to restrain the defendant from obstructing or interfering with those rights, and also to prevent the defendant, his servants or agents from discharging the sewage from his dwelling-house, yard and offices and other houses on his property into a stream flowing through the plaintiff's property. The defendant denied the doing of any of the acts complained of, save the discharge of sewage from his dwelling-house and office-houses and yard. He alleged that he had discontinued the discharge of sewage, and he paid £5 into Court in respect of that cause of action. The plaintiff accepted the £5 in respect of that particular cause of action, but insisted on her alleged rights in respect of the other causes of action.

The plaintiff and defendant were the owners of adjoining lands situate near Carrickfergus, all of which were purchased under the provisions of the Land Purchase Acts, and were registered under the Local Registration of Title (Ireland) Act, 1891, in Folio No. 1715 of the Register, County Antrim. On 8th March, 1911, the defendant conveyed to the International Salt Co., Ltd., two pieces or parcels of land containing 5 acres 2 r. 38 p., and a parcel of land used by the Company as a turn-table, all of which lands were comprised in Folio No. 1715, together with (amongst other rights) full power and authority, so far only as the defendant had power to give same, to stop up and divert into the Company's property the water in a

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stream running down by a fence in a lane known as Trailcock Lane. One of the pieces of land so conveyed was the site of a dam. At that time the Company had erected or were about to erect considerable works on their five acres, connected with the salt mining industry they were carrying on in the district. The burden as to the water was duly registered on Folio No. 1715 on the 19th April, 1911. This stream was an artificial one, and its source was a pipe coming out of a mill race running along the face of higher ground to Carrickfergus, and out of which supplies were taken for the use of the farms below this mill race and lying between it and the shore. This Trailcock stream had got impregnated with salt from the salt works, and a pipe had been put into it at a point above the source of pollution from salt, and this carried the water down to a pump or fountain where Trailcock Lane meets the county road. Off this pipe half-inch supply pipes were provided to give a supply of pure water from the stream to the occupants of lands bordering on Trailcock Lane, and at the date of the deed the defendant was entitled to three such half-inch pipe supplies. Originally the pipe was carried along the bank of this stream, but prior to this deed a new pipe had been put in and laid in the bed of the stream. Before the execution and registration of the deed the water flowed along the stream, part uncontaminated with salt, as it was in the pipe, and part contaminated with salt as it flowed open in the stream.

By deed of 1st September, 1911, made between the defendant, of the one part, and the International Salt Co., Ltd., of the other part, the defendant conveyed to the Company and their assigns full power and authority to take, use and enjoy, subject and without prejudice to the rights of all other persons legally entitled, all the water issuing or coming from another river or stream shown on a map endorsed on said deed, and to divert between the points marked "X" and "Y" on said map and convey the same water to the portion of the lands marked "A" on the map, and for that purpose to lay pipes across the defendant's lands to convey the water to "A," the pipes to be laid so as not to interfere with the cultivation of the defendant's lands above the pipes, the

Company paying compensation to the defendant for such damage as might be done to his lands. The evidence showed that at the date of the execution of this deed, the water issuing and coming from the river or stream and down to "X Y" on the map, was only the water which was carried from two drains, one from the defendant's lands, and another from the lands of a man called Donaldson, under an aqueduct which carried water away from "X" and "Y" and down past the defendant's house to the county road and from another drain at "X." It was also established in evidence, that if the bank where the stream "X Y"—or rather, these drains—cross the aqueduct were taken away, all the water in the aqueduct would come down by "X Y," and could be diverted to the reservoir at "A," which the Company wanted as full as possible to supply their works. This deed was duly registered on 5th September, 1911, and on the International Salt Company's Folio No. 7306 there appears an easement, and on the defendant's Folio No. 1715 a burden, in terms similar to those contained in the deed, but instead of referring, as is done in the deed, to the water issuing or coming from the river or stream shown on the map endorsed on the deed, the reference is to the river or stream shown on the Land Registry office maps.

The office map in the case was a copy of the Ordnance Sheet with certain markings placed thereon. It showed a watercourse down to the point "B," a connecting channel from "B" to "X," and a watercourse from "X" to the county road, but the first watercourse stopped short at "B," and was not shown on the office map to run from "B" past defendant's tank down to the county road. The watercourse, in fact and in nature, ran from "B" past the tank to the county road, and so ran when the deed of 1st September, 1911, was executed, as was shown by the map on that deed, and by the evidence of defendant's witnesses. It further appeared from the evidence that the defendant constantly used for every purpose the water which came from "B," past his tank and on to the county road.

It was contended, on behalf of the plaintiff, that her rights were determined by the entries on the folio taken

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in conjunction with the office map, and that under the Local Registration of Title (Ireland) Act, 1891, these entries were conclusive in her favour.

Murphy K.C., *Megaw K.C.*, *Lowry K.C.* and *McCoy* for the plaintiff.

McGonigal K.C., *Robb K.C.* and *McKean* for the defendant.

WILSON, J.

WILSON, J.: This action is brought by the plaintiff as successor in title to and purchaser for value without notice from the International Salt Company, Limited, against the defendant for a declaration that the plaintiff is entitled against the defendant to certain water rights and an injunction to restrain the defendant from obstructing or interfering with those rights, and also to prevent the defendant, his servant or agents, discharging the sewage from his dwelling-house, yard and offices and from certain houses on defendant's property into a certain stream which flows on and through the plaintiff's property. The defendant denied the doing of any of the acts complained of, save the discharge of sewage from his dwelling-house and office-houses and yard. He alleges he has discontinued that, and he paid £5 into Court in respect of that cause of action. The plaintiff has accepted the £5 in respect of that particular cause of action, but insists on her alleged rights in respect of the other causes of action.

Now the first cause of action is in respect of the alleged taking of water from the stream running down by the fence in Trailcock Lane. That is founded on a deed dated 8th March, 1911, made between the defendant, of the first part; J. A. M'Alister and Elizabeth M'Alister (chargeants), of the second part, and the International Salt Company (thereinafter called the Company), of the third part. By this deed the defendant conveyed, and the grantors of the second part confirmed and released, to the Company some 5 a. 2 r. 38 p. of the lands of Cloughlands, in the East Division of Carrickfergus and County Antrim, as described on a map endorsed on the deed, and a portion of said lands used by the Company as a turn-table, and amongst

other rights, "full power and authority, so far only as the grantor has power to give same, to stop up and divert into the Company's property the water in the stream running down by the fence in Trailcock Lane." At that time the Company had erected or were about to erect considerable works on their five acres connected with the salt mining industry they were carrying on in the district. The defendant's lands were registered lands, Folio No. 1715, County Antrim, and this burden as to the water was duly registered on that folio on the 19th April, 1911, under the provisions of sections 25, 30 (3) (a), and section 45 of the Local Registration of Title (Ir.) Act, 1891. This stream was, like all the streams in this case, an artificial stream whose source was a pipe coming out of a mill race running along the face of the higher ground to Carrickfergus, and out of which supplies by pipes were taken for the use of the farms below this mill race and lying between it and the shore. This Trailcock stream had got impregnated with salt from the salt works, and a pipe had been put into the stream about the point "F" on the map, above the source of pollution from salt, and this carried the water down to a pump or fountain where Trailcock Lane meets the county road. Off this pipe half-inch supply pipes were provided to give a supply of pure water from the stream to the occupants of the lands bordering on Trailcock Lane, and at the date of this deed the defendant was entitled to three such half-inch supplies. Originally the pipe was carried along the bank of this stream, but prior to this deed a new pipe had been put in and laid in the bed of the stream. Down along that stream, before the execution and registration of this deed, came the water in the stream, part uncontaminated with salt, as it was in the pipe, and part contaminated with salt as it flowed open in the stream, and the seepage from the salt mines flowed into it. The Company has ceased to work the salt mines, and the real contest between the plaintiff and defendant now is who can get the best supply of water to develop the defendant's property, which lies to the west of the county road, and the plaintiff's, which lies to east of the county road from Carrickfergus to Eden, for building purposes. The defendant says he has not interfered with the water in

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the stream running down by the fence in Trailcock Lane, as he has only taken some of the pure water out of his half-inch supply out of this pipe nearest to the county road, and that this is not water in the stream, but only water in the pipe. However, the water in this pipe would always, but for the pipe, have been water in the stream; portion of that water was merely kept pure by enclosing it in the pipe, and at the date of this deed for value the water in the pipe was water in this stream for the pipe and the water in it were all in the stream. The defendant, having sold for value to the Company, so far as he could legally do so, the water in this stream and given the Company full power to stop up and divert into the Company's lands that water, cannot be listened to in his attempt to derogate from his grant duly registered. The plaintiff, as registered owner, under her conveyance from the Company of 9th May, 1923, duly registered under Folio No. 7306, County Antrim, and including the easement conferred by this deed of 8th March, 1911, is entitled against the defendant to all the water in the stream running down Trailcock Lane, including the water in the pipe in that stream. I accordingly decide in the plaintiff's favour on this cause of action, and declare that she is entitled against the defendant to this right, and I grant the injunction asked for in respect of it.

The next cause of action arises on the claim arising on the indenture of 1st September, 1911, made between the defendant, of the one part, and the Company, of the other part. This deed was duly registered on 5th September, 1911, and *inter alia* the defendant thereby conveyed to the Company and their assigns full power and authority to and for the Company and its assigns to take, use and enjoy, subject and without prejudice to the rights of all other persons legally entitled thereto, all the water issuing or coming from the river or stream shewn on the map endorsed thereon, and to divert between the points "X" and "Y" and convey the same water to the portion of the lands marked "A" on the map thereon endorsed, and for that purpose to lay pipes across the defendant's lands to convey the water to "A," the pipes to be laid so as not to interfere with the cultivation of defendant's lands above the pipes, and the Company to

make compensation to the defendant for the damage done to his lands thereby. Now I have admitted, subject to the objection taken by Mr. Murphy, K.C., on behalf of the plaintiff, evidence to show what was the condition of affairs in regard to this stream at and prior to the execution of this deed. It is established in evidence that at the date of the execution of this deed the water issuing and coming from the river or stream and down to "X Y" on the map was only the water which was carried from two drains, one from defendant's lands and another from Donaldson's lands, under an aqueduct which carried water away from "X" and "Y" and on down past defendant's house to the county road and from another field drain at "X." It was also established in evidence, if not admitted, that if the bank where the stream "X Y" —or rather these drains—cross the aqueduct were taken away, all the water in the aqueduct would come down by "X Y," and could be diverted to the reservoir at "A" which the Company wanted as full as possible to supply more water for their works. All the parties and their advisers were on the lands and saw or could see this condition of affairs before the deed was executed. There are probabilities in favour of each party as to what was meant.

The Company, I am convinced, wanted water, and could not have got a sufficient supply for their reservoir at "A" unless they got all the water from the aqueduct. The defendant was not likely to give them all this water, as it was the supply for his house and premises, where he carried on the business of a dairyman and could not do without water, and he also had already leased or granted away rights to the flow of the water in the aqueduct to a purchaser of lands marked leased and coloured white on Mr. Woods' map, and could not derogate from that grant. That land is now in defendant's possession again as the lease has terminated. It is also said that the Company, though it carried on its work till January, 1915, and afterwards under a liquidator in a sort of a way till 1923, when this right was conveyed to the plaintiff, did nothing to insist on its alleged right to this water or to do away with the embankment. The plaintiff's reply to this is that by arrangement with the Company an

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alternative method of supplying the reservoir with water was adopted, viz., a pipe was put direct into the reservoir from the aqueduct entering the reservoir and filling it at its south side. I accept the evidence of Mr. Charles F. R. Smyth on this point, in preference to the evidence of the defendant and his witnesses that such pipe was only put in during the summer of 1911 and taken out when the rains came on about November, 1911, and never used again. I find that this pipe was used till Mr. Smyth left in 1915. The works were never stopped for want of water all that time, and the boilers used some 5,000 or 6,000 gallons a day, all got from this reservoir. However, Mr. Smyth only proves that this pipe was there, and cannot prove any agreement between the parties to substitute this supply in place of the right granted by the deed registered on 5th September, 1911. I am, therefore, driven back to the construction of the deed of 1st September, 1911, and the registration of that deed on 5th September, 1911. What is granted by the deed is the water issuing and coming from the river or stream shewn on the map endorsed on that deed. This map only shows the river or stream up to where it meets the aqueduct, and does not show any aqueduct. On the construction of this deed and on the oral evidence, especially of Mr. McGonigal, that no water from the aqueduct (except from possible overflow) came down or issued into this stream and went down to "X Y," I would have decided that the Company were not entitled to insist on the removal of the embankment or to get any of the water in the aqueduct to flow down to "X Y" on the map. However, the deed did not affect these registered lands or the rights to the water until it was registered, and then it only affects these lands as it is registered, and the estate of the registered owner is subject to the burdens registered as affecting the land. Section 30 (3) (a) and the register is conclusive evidence of the title of the owner to the land as appearing thereon. This burden was registered on defendant's Folio No. 1715, and the right to the easement as appurtenant to the Company's lands was registered on Folio No. 7306 in identical terms. What was there registered was the right "to the water issuing or coming from the river or stream shewn on the office maps, and to divert

the same between the points 'X' and 'Y,' etc." Now, the river or stream shewn on the office maps is, unfortunately, a river or stream tracing up from "Y" to "X," and on to where it joins the aqueduct at the point "D" on Mr. Woods' map and on back to "E," where it has been proved that a pipe is taken off the mill lead to the Carrickfergus Mills already mentioned, for the purpose of supplying these lands of Cloughlands. This office map does not show the aqueduct continuing on past "D" on Woods' map and going on down to defendant's house. It all comes down at "D," along the old natural course leading to "X Y." I believe this arose from the fact that the office map is made from the Ordnance Sheet, surveyed about 1901/02 and published in 1904, and did not show the actual state of the water when it was used in 1911. However, both the defendant and the Company allowed the registration to be made as shewn by this map, and the plaintiff bought her rights under the registered owner of this title under this registered deed. It was the deed as registered that alone affected the lands of the defendant.

In my judgment, this registered title gives, so far as defendant could give it, the right of having the entire of the water coming down to "D" sent along to "X Y" as shewn on this office map. No doubt the registration might have been rectified for fraud or mistake in a suit between defendant and the Company, but the plaintiff here is a purchaser for value without notice of any defect in the registered title, and even if this suit sought rectification, I doubt if defendant could now succeed in rectifying the registration which has affected his lands and the Company's lands since September, 1911, and on the faith of that registration plaintiff has paid her money for the lands.

The conduct of this case is a good illustration of the position of a purchaser for value without notice. The plaintiff bought in 1923 on the faith of the registered title and map referred to therein. Mr. Murphy, for the plaintiff, opened this case on that registered title and the office map, which seemed to give him the whole water in the aqueduct coming down to "X Y," and he did not refer in any way to the map on the original deed. Mr.

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M'Gonigal, for the defendant, relied on the facts and the map on the original deed, which did not apparently give the plaintiff any water from the aqueduct. It was not till Mr. Megaw replied for the plaintiff that it was made clear that the plaintiff claimed her rights under the registered deed and the map referred to in it, viz., the office map, regardless of whatever might be the construction of the original deed and the map referred to in it. I had, therefore, to allow Mr. Robb to again speak for the defendant in reply to Mr. Megaw's argument. Apparently neither the plaintiff nor her advisers were aware when this case was opened in Court that there was any discrepancy between the map on the original deed and the map on the registered deed. As I am of opinion that it is only the registered deed that affects these lands, and that on its true construction the plaintiff is entitled to have the whole of the water in the aqueduct sent down to "X Y," I must decide in favour of the plaintiff on this cause of action also and give the declaration and injunction asked for in respect of it, and order the defendant to pay the plaintiff's taxed costs in respect of it.

There remains the cause of action in respect of the discharge of sewage and slop water from certain water closets and house sinks on defendant's lands into the stream flowing along the foot of defendant's lands and thence under the county road into and through plaintiff's lands. The sewage from defendant's dwelling-house, yard and offices used to be discharged into this stream, but that has been discontinued, and money paid and received in discharge of that injury. However, the defendant contends that he is entitled to discharge impure water from a couple of houses in the field on the Carrickfergus side of the right of way to "A" and from a number of houses on his field on the other side of the right of way into the stream, because he first passes these impure waters through a filtration and sediment tank which more or less makes these discharges less impure. Mr. Swiney, the well-known water engineer and a witness for the defendant, admits that these tanks do not entirely purify these discharges. The defendant does not claim any prescriptive right to discharge these foul waters into this stream, and thence on to the plaintiff's lands. He

says the water in this stream is foul already, and, therefore, he is entitled to foul it more, and he relied on *The Attorney General* v. *Gee* (1), decided in 1870, and contends that the injury is so slight that no injunction ought to be granted. Whether that case was rightly decided or not, its facts are quite different from this case. In my judgment, the pouring of this polluted water into this little stream, and thence on to the plaintiff's lands, is a clear case of unjustified trespass. In addition, the new houses built on defendant's field are all supplied with water closets, and the drains are being laid and are intended to be drained into the filtration tank on defendant's field, and thence into this stream and on to the plaintiff's lands, if the defendant succeeds in his contention. The stream, as it runs through plaintiff's lands, will become an open sewer, and the law, it is said, is powerless to prevent this. It is stated in Halsbury, Vol. 28, p. 435, par. 869, "when water is polluted it is not necessary that the person who has the right to complain of the pollution should prove that he has suffered actual damage before the Courts will interfere to protect him. It is sufficient to prove that his right to have the water flow to him in its natural state has been infringed." This has been proved in this case, and it is just and convenient that this injury should be stopped, and an injuction to restrain its continuance should be granted, and the defendant should pay the costs. In the result, the plaintiff has succeeded in the entire action, and the defendant must pay to the plaintiff the costs of the action when tried and ascertained.

The defendant appealed to the Court of Appeal (2).

1929.

McGonigal K.C., *Robb K.C.* and *McKean K.C.* for the defendant and appellant:—

We submit that the learned Judge could not be right when he said that the water in the stream included the water in the pipe.

As to the second cause of action, Wilson, J., decided that the registration was conclusive. We submit (a) that

(1) L.R. 10 Eq. 131.

(2) In the Court of Appeal before Moore, L.C.J., Andrews and Best, L.J.J.

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on the construction of the deed of 1st September, Wilson, J., was in favour of the defendant; (b) that, having regard to the facts of nature, the plaintiff was not entitled to succeed; (c) that the registration is not conclusive; (d) that plaintiff was not a purchaser for value. It was not until Mr. Megaw, K.C., came to reply in the Court below that the claim based on the registration was raised. We contend that the water in the pipe was not dealt with by the indenture of 8th March, 1911, and that on the construction of the deed the defendant is entitled to succeed. As to the question of registration, regard must be had to the circumstances existing at the time of the execution of the deed. The words used are—"The water issuing and coming from the stream." The plaintiff is not entitled to get anything more than what is covered by these words. All that the plaintiff got was what was in nature coming from the river or stream. There is no section in the Local Registration of Title (Ireland) Act, 1891, which directs that the last revised ordnance map is to be used for the purpose of delimiting an easement.

We rely on the words used by Lord Romilly, M.R., in *Morland* v. *Cook* (1), where he said, at p. 263, "This principle of the obligation of making inquiry arising from the nature of the property is of constant application in the English law."

The register is not conclusive as to an entry such as we are dealing with at present. Where anything was to be conclusive it was put into a section of the Local Registration of Title (Ireland) Act, 1891. There is no declaration in this Act that the register shall be conclusive with respect to incorporeal hereditaments.

We submit that the learned Judge's order was wrong, and should be reversed.

[They also referred to the Local Registration of Title (Ireland) Act, 1891, sections 4, 19, 20, 21, 22, 27, 28, 30, 31, 34, 35, 40-43, 45, 46, 54-57, 95; to the Conveyancing Act, 1882, section 3, and to *Carey* v. *Muldoon* (2).]

(1) L.R. 6 Eq. 252. (2) 51 I.L.T.R. 207

Murphy K.C., Megaw, K.C., Lowry K.C. and *McCoy* for the plaintiff and respondent:—

To give any other decision than that given by Wilson, J., is to abrogate the whole policy of the Local Registration of Title (Ireland) Act, 1891. In Browning and Glover, 2nd edition, p. 33, it is stated, "Deeds dealing with registered land are, in point of fact, little more than directions to the Registrar to make certain entries in the register, and, the entries having been made, the deeds cease to be of any great importance; for the title depends on the register and not on the deeds."

This deed relates solely to registered land, the title is based on the register. We submit that rights of leased land do not affect the present question. In so far as the map is not limited by Statute, it remains conclusive.

As to the question of the Trailcock stream, it is entirely a matter of the meaning of the words, and the meaning of the words is entirely in plaintiff's favour.

[They also referred to *In re Keogh, Grantor, Kettle, Grantee* (1), *Lord Norbury* v. *Kitchin* (2), and to the Local Registration of Title (Ireland) Act, 1891, sections 14, 19, 21, 30, 34, 40, 42, 55-57).]

McGonigal K.C. (in reply):—

Even on the construction of the folio, the defendant is entitled to succeed. If the words quoted on behalf of plaintiff from Browning and Glover are meant to extend to burdens, they are not borne out by the Act of Parliament. There is no section in the Local Registration of Title (Ireland) Act, 1891, which enacts that placing a right on the folio makes it conclusive. The conclusiveness of the register is confined to the title to the land.

Cur. ad. vult.

June, 13.

ANDREWS, L.J.

ANDREWS, L.J.: The Lord Chief Justice, who is unavoidably absent, has requested me to say that he has read and concurs in the judgment which I am about to deliver.

(1) [1896] 1 I.R. 285. (2) 3 Foster & Finlason 292.

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ANDREWS, L.J.

This is an appeal from the judgment of Wilson, J., dated 17th December, 1928. The action is conversant with the rights of the parties in two streams. The writ and statement of claim also contained a cause of action for pollution by sewage; but from the injunction of the learned Judge in reference to such pollution no appeal has been taken.

The material facts of the case are as follows: The plaintiff and defendant are the owners of adjoining lands situate near Carrickfergus, all of which were purchased under the provisions of the Land Purchase Acts, and were registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, in Folio No. 1715, of the Register, County Antrim. On 8th March, 1911, the defendant conveyed to the International Salt Co., Ltd., two pieces or parcels of land containing 5 a. 2 r. 38 p., and a parcel of land used by the Company as a turn-table, all of which said lands were comprised in the above mentioned folio, together with (amongst other rights) full power and authority, so far only as the defendant had power to give same, to stop up and divert into the Company's property the water in the stream running down by the fence in Trailcock Lane. One of the pieces of land so conveyed was the site of a dam, to which reference will be made later. This conveyance was duly entered on Folio No. 1715, County Antrim, and the lands so conveyed were transferred to a new Folio No. 7306, County Antrim.

On 1st September, 1911, a supplemental deed was executed, by which the defendant conveyed to the International Salt Co., Ltd., certain rights therein mentioned, including full power and authority to and for the Company and its assigns to take, use and enjoy, subject and without prejudice to the rights of all other persons legally entitled thereto, all the water issuing or coming from the river or stream shown on the map thereon endorsed, and to divert between the points marked "X" and "Y," and convey the same water to the portion of the lands marked "A" on the said lands (being the dam above referred to), and for that purpose to lay, construct and maintain under the lands of the defendant such pipes, mains or other works as the Company and its assigns

might consider necessary for the purpose of diverting and conveying the said water to the said lands marked "A" at such depth as would not interfere with the cultivation of the ground above the said pipes, mains or other works, the Company making to the defendant, his heirs, executors, adminstrators or assigns, reasonable compensation for any damage done thereby, to hold all such rights unto the Company and its assigns to the intent that same should be for ever appurtenant to the lands comprised in the indenture of 8th March, 1911. This deed was registered in both folios on 5th September, 1911.

The lands so acquired by the said International Salt Co., Ltd., together with all rights appurtenant thereto, were subsequently purchased by the plaintiff, who on 3rd June, 1923, was duly registered as owner thereof in fee simple.

The causes of action in respect of the two streams must be separately considered. The first relates to an alleged interception and taking of water from the stream running down by the fence in Trailcock Lane for the use of the defendant and his tenants, whereby, it is submitted, the plaintiff was wrongfully deprived of the water, and his rights under the indenture of 8th March, 1911, were pre judiced and infringed. The acts complained of by the plaintiff are alleged to have been committed from the month of September, 1911, though the plaintiff had no interest whatever in the premises, and, accordingly, no possible cause of action, until the year 1923. The true significance of the year 1911 as the date of the commencement of the alleged wrongful acts is, however, that it shows, as is indeed admitted, that the cause of action, if any, has existed, without any previous complaint, ever since the plaintiff's predecessors, the International Salt Co., Ltd., entered into possession of their lands.

The precise nature of the plaintiff's complaint is this: Close to the fence in Trailcock Lane there flows a stream which, for a considerable part of its length, is impregnated with brine from the Carrickfergus Salt Mine. At a point in the stream slightly higher than that at which the brine enters, there is a small dam, from which uncontaminated water is conducted in a two inch pipe along

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Trailcock Lane to a pump or fountain at the bottom of the lane close to the county road, which divides the plaintiff's and defendant's lands. When this pipe was first laid down, in or about the year 1898, it ran on the bank and somewhat above the level of the water in the stream. When it was renewed about the year 1910 by the International Salt Co., Ltd., who were then in occupation of, but had not obtained the conveyance of their lands, it was laid in the bed of the stream; and this was admittedly its position when the deeds of 1911 were executed. From this pipe there ran four half-inch supply pipes, three of which conveyed water to drinking troughs for cattle in defendant's fields, and the fourth of which supplied water to the house of one John Colville on the opposite side of the lane. Such water as reached the pump or fountain at the end of the lane, and was not there used, had formerly overflowed into the Trailcock Lane stream just where it turned from the lane to run in a north-easterly direction along the foot of defendant's field adjoining the county road; but on 1st January, 1910, certain parties interested in the water signed a document addressed to the plaintiff's predecessors, the International Salt Co., Ltd., by which they consented to the Salt Company joining on a pipe to the water pipe at the fountain to convey any surplus water running in the pipe across the road to the Salt Company's works. It was, however, expressly stipulated that the Salt Company was only to use such surplus water in such a manner as not to interrupt or lessen the flow of water to such fountain or to any of the other places theretofore supplied from said pipe.

The original of this consent was destroyed, but a copy was proved subject to the objection by plaintiff's counsel that, as it had never been registered or entered on the folio, it was not admissible evidence against the plaintiff, a purchaser for value without notice. In my opinion the objection is good in so far as it might be relied upon to deprive the plaintiff of any rights to which she might otherwise be held entitled upon the documents noted in the folio; but I think it is quite permissible to refer to the document for the purpose of confirming what I think is otherwise clearly established, that the water in the pipe running to the fountain was dealt with quite apart from

and as something wholly different from the water in the stream running along Trailcock Lane.

Such were the facts and circumstances as they existed when the defendant, by the indenture of 8th March, 1911, granted to the plaintiff's predecessors, the Salt Company, "full power and authority . . . to stop up and divert into the Company's property the water in the stream . . ." Admittedly, such facts and circumstances still continue unaltered; and the case, and the only case, which the plaintiff made in her pleading and before the learned Judge was that the water in the stream in respect of which such right of stopping and diversion existed included the water in the pipe in the said stream, as well as the water flowing in the bed of the stream. The learned Judge accepted this contention; and, being of opinion, as appears by the judgment, that the defendant's taking water since the year 1911 by a half-inch supply pipe out of the pipe in the stream constituted a breach of the registered rights of the International Salt Co. under the deed, he granted an injunction against the defendant, restraining him from taking or diverting the water or any part of the water from the stream, including the water in the said pipe.

The defendant complains that if this order stands he will be deprived of the regular supplies of drinking water for his cattle, of which he has been in continuous enjoyment since the two inch pipe was first laid down. The long and uninterrupted exercise by the defendant of the right which he claims to take water by these service pipes may not necessarily determine the case in his favour; but I think, in the event of any ambiguity, it may fairly be relied upon as evidence of what was present to the minds of the parties when the deed of March, 1911, was executed, which conferred on the Salt Company the right of taking or diverting the water from the stream. If by this deed it was ever intended that they should get the fresh water from the pipe which would be invaluable for their boilers, what explanation can be offered as to why they not only slept upon their rights, when, as we are told, every drop of water was required, but even went to the trouble and expense of obtaining the supplemental

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deed of 1st September, 1911, in order to secure another wholly distinct supply of fresh water.

The rights of the parties in respect of the water in this pipe do not, however, rest merely on considerations such as these. I prefer to rely upon the actual words of the deed as applied to the admitted facts of the case. For thirteen years before the deed of 1911 pure drinking water had been flowing in and through this pipe, whilst the wholly different brine water flowed in the stream. For twelve of those thirteen years the pipe had been physically placed outside the stream. After the consent of 1st January, 1910, the International Salt Company, in renewing the pipe, placed it in the bed of the stream; but the water flowing through it remained as distinct from the water in the stream as ever it did, not only in quality but in all other respects. Different rights existed in respect of the water in the pipe and the water in the stream. In my opinion, in these circumstances it would be placing a wholly unnatural meaning upon the language of the deed were we to say that the water in the pipe was included in the words of the deed, namely, "water in the stream running down by the fence in Trailcock Lane." It is rather "water taken from the stream" than "water in the stream." I also agree with Mr. McGonigal that, whilst the words by which the right is conferred by the deed, namely, "power to stop up and divert the water," are appropriate words to use in reference to water in the stream, they are not at all applicable to water contained in and flowing through a pipe. In my opinion, therefore, the declaration which Wilson, J., made in reference to this matter was wrong, and the injunction must be discharged.

I should, perhaps, add that an attempt was made on the hearing before us to present an alternative case, namely, that even if the water in the pipe is not water in the stream, and if it is, accordingly, outside the deed of 8th March, 1911, the plaintiff is entitled to succeed on the ground that the defendant is now using the water flowing through one of the half-inch service pipes for the purpose of supplying some houses which he has recently erected with water, and this, the plaintiff says, has increased the

burden, and has so reduced the overflow of the water from the pipe at the pump or fountain to which she is entitled. Personally, I have grave doubts as to whether she could succeed on this case, as it may well be that the half-inch pipe is the measure of the defendant's right; but it is enough to say that this contention, wholly inconsistent with plaintiff's main argument, cannot be entertained in the present case, in which it was neither pleaded nor raised at the trial, and in respect of which no amendment has been sought.

I pass now to the stream "X Y." Here also the first thing which strikes one is that the matter complained of is in no sense a new work; it is merely the maintenance of an alleged embankment or dam across the stream at the point marked "B" in Mr. Seeds' map, higher up than the points marked "X" and "Y." This embankment, it is alleged, has the effect of wrongfully diverting the water from what the plaintiff contends is its natural course "X Y," and of directing it past the point "N," where it fills a tank from which water flows in a pipe to supply the defendant's house and dairy premises, the surplus flowing on in a continued straight line under the county road past premises belonging to another Company called The Salt Union, Ltd.

It is not alleged that the circumstances which at present exist are in any way different from those which existed at the date of the deed of 1st September, 1911. At that date the only water of this stream which in fact found its way into the stream "X Y" was such as in times of flood overflowed the embankment. The normal source of supply of water for the stream "X Y" then was and still is water from the drains in other fields of the defendant and Thomas Donaldson, which was carried in pipes under the stream and through a culvert, and also water from a drain in another of the defendant's fields which joined at the point "X." The plaintiff now seeks to have the embankment or dam at "B" removed, so as to get all the water from the stream for her own use.

There is, in my opinion, nothing in the deed or map endorsed thereon which warrants such a claim. The deed conferred power on the International Salt Company, subject to the rights of others, to take all the water issuing

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or coming from the river or stream shewn on the said map, and to divert between the points marked "X" and "Y." The only points between which a stream is clearly shown on this map is from "X" past "Y" to the county road. Between the point marked "X" and the point "B" on Mr. Seeds' map there is merely a dotted line, indicating rather an underground or culverted drain, or at any rate a much smaller stream—something certainly much more consistent with the flow of the drainage water referred to than with the existence of a continuous open stream. As no stream whatever is shown on the map on the deed at or above "B" it is obvious to my mind that it was not intended to interfere with it or with the rights in it in any way. The deed, accordingly, in my opinion, merely refers to the "X Y" stream; and there is nothing in it which conferred upon the grantee the right to get any more water diverted into the "X Y" stream than that which supplied it at the time that the deed was executed.

This view is supported by the fact that the Salt Union Company enjoyed the right to the flow of water already referred to. With that right outstanding against the defendant it was legally impossible for him to make the grant to the International Salt Co., Ltd., for which the plaintiff now contends; for any such grant would be in complete derogation of his former grant to the Salt Union Company. It is also inconceivable that the defendant would make a grant, the effect of which would be to divert all the water away from the portion of the stream which supplied his tank, and through it, his house and dairy farm.

The same conclusion as I have expressed was arrived at by Wilson, J.; and, had the matter rested there, he would have held in the defendant's favour; but it does not. The deed was registered in both folios, namely, in the International Salt Company's Folio No. 7306 as an easement, and in the defendant's Folio No. 1715 as a burden in similar terms to those expressed in the deed. There is nothing inaccurate in the entry in either folio. It simply follows the wording of the deed, save in one respect, namely, that instead of referring, as in the deed, to the stream shewn on the map endorsed thereon, the entry in the folio refers, as is usual in such cases, to the

stream shewn on the Land Registry office maps. Such office map is, in fact, merely a copy of the Ordnance Map, and it differs in the present case in at least one material respect from the map on the deed, in that it shows a stream not only between "X" and the county road but also the stream which flows down to Mr. Seeds' point "B"; and these two points "B" and "X" are connected by a single wavy line, save for a very minute gap where the water is culverted under a cartway. Further, this office map shows no stream running on in a direct line from "B" past the defendant's tank to the county road. Put shortly, the map clearly implies that all the water which reaches the point "B" from any source finds its way down to the portion of the stream known as "X Y," from which the International Salt Company were empowered to make the diversion to their dam.

This office map is at variance both with the map on the deed and also with the facts as they are proved to have existed not only at the date of the deed but also uninterruptedly until the present time. In proof of the fact that it was well known to the International Salt Company that the proper flow of the water in the stream when it reached "B" was on past the defendant's tank to the county road, I would mention that in the year 1911, within at most a few months of the execution of the deed, water was by arrangement conducted to the dam by a pipe laid from the stream at a point between the tank and the county road, instead of being taken, as provided in the deed, from the "X Y" stream.

As against all these facts and circumstances, the plaintiff relies simply on the entries in the folios as interpreted by the office map. These, her counsel declares, are under the Local Registration of Title Act, 1891, conclusive; and he further submits that his client, who purchased, as he alleges, on the folio, though there is no evidence on this point, is a bonâ fide purchaser for value without notice of the contents of the deed in so far as they differ from the folio and office map. Wilson, J., accepted this contention, and, accordingly, held in the plaintiff's favour, directing an injunction to issue against the maintenance by the defendant of the embankment at the point "B," so as to divert the flow of the water and prevent the

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plaintiff from obtaining all the water issuing or coming from the stream shewn on the office map. If such be the law it is obvious that it works a grave injustice to the defendant, who was in no way responsible for the terms of the folio or for any inaccuracy in the office map.

After careful consideration, however, of the relevant sections of the Act, I am clearly of opinion that they have not the far reaching effect contended for by the plaintiff. I have already dealt with the case at such length in this judgment that I do not propose to review the sections seriatim, but shall content myself with briefly stating the conclusions at which I have arrived. Two sections of the Act relate to the conclusiveness of the register. The first of these is section 34, by which the register is made conclusive evidence of *the title of the owner to the land as appearing thereon*, subject to a limited power of rectification thereof on the ground of actual fraud or mistake. In my opinion, the scope and operation of this section is limited in express terms to the title of the owner to land, which term "land" is by section 95 defined, unless there is something inconsistent in the context, to include all corporeal hereditaments, but no other hereditaments. Now, in several sections of the Act, such as sections 19 and 21, the term "land" is stated for the purpose of those sections to include incorporeal hereditaments. No similar words are to be found in section 34, from which one must conclude that the Legislature did not intend to give to entries relating to mere incorporeal rights the sanctity of conclusiveness which the Statute provided should apply to entries on the register relating to the title of the owner to lands. Still less was it intended to make such entries conclusive, as is suggested, as to the character, nature and extent of such rights.

The second section to which I have referred is section 57, by which in certain specified cases, and after the service of the prescribed notices, an entry may be placed on the register as to the conclusiveness of boundaries, and they shall thereupon be conclusive upon all parties. In all other cases neither the description of the land in the register nor the description on the maps is conclusive as to boundaries or extent of the land (section 55). These sections (55 and 57), instead of helping the plaintiff in the

present case, appear to me to be a strong argument against her; for if, save in exceptional cases, the Ordnance Maps are not conclusive as to the boundaries or extent of the land included therein, it would surely be unreasonable that they should be conclusive as to the nature and extent of incorporeal rights over lands which are outside such boundaries, and which from their very nature cannot, properly speaking, be represented on a map.

We were also referred to sections 29, 30, 45 (j), 46 and 47 (g) as to the registration of burdens and easements, I am wholly unable to find in them any words or provision which render any such registration binding or conclusive on the owners of the lands affected thereby.

For these reasons I agree with my colleagues that in this respect also the judgment of Wilson, J., must be reversed, and that the injunction which he granted in reference to the "X Y" stream must be set aside. The defendant will have his costs of suit, including the costs of this appeal.

Since the hearing of this appeal I have read with much interest the report of the case of *Devoy* v. *Hanlon* (1), which was decided by the Supreme Court of the Irish Free State. In that case the registered owner, who was advanced in years, transferred his farm for a purely voluntary consideration to his son, the plaintiff, intending to apply for an old age pension. The deed was never registered, and two of the three Judges who constituted the Court were of opinion that the gift was incomplete, as the evidence was not sufficient to prove that the deed was ever delivered. Ten years after the deed was signed the old man died, and by his will left all his estate and effects to his daughter, the defendant, whom he appointed sole executrix, and who caused herself to be registered as owner. The Court was, however, unanimously of opinion that the Local Registration of Title (Ireland) Act, 1891, provides for the recognition of rights, including estates, which do not appear on the register, and held that such rights are valid against the registered owner creating them, against a voluntary transferee from the registered owner, and against every one claiming through a volun-

(1) [1929] I.R. 246.

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tary transferee where the person so claiming has not given valuable consideration.

The case is one of great importance, especially as it expressly disapproves of certain dicta of the late Court of Appeal in Ireland in *Pim* v. *Coyle* (1), as to the inability of a registered owner to create any right, estate, interest, equity or power in or over registered land otherwise than by a registered disposition. The judgment of the Court, and in particular that of Kennedy, C.J., refers to cases in which the valid existence of unregistered estates, rights and interests outside the Statutory Registers is recognised by the Act, such as, for example, estates in remainder or reversion expectant on registered freehold estates (Sect. 25 (1)), burdens which affect all registered land without registration (Sect. 47), valid trusts (Sects. 63 and 71 (6)), powers existing under instruments outside the register (Sect. 39), and mortgage by deposit (Sect. 81 (5)).

The case does not, in my opinion, govern the present, for there the title of lands was involved, whilst in the present case we are concerned with the nature and extent, or, if I may use the expression, with the identification of a mere incorporeal hereditament. Again, the claim in that case was made by an unregistered holder against a newly-registered owner who was merely a volunteer from the previous registered owner; whilst in the present case the easement is claimed by an unregistered owner against a purchaser for value. At the same time the case is of assistance, as it constitutes a complete answer to the sweeping arguments which were addressed to us as to the conclusive character of the register for all purposes; and it contains nothing which is, in my opinion, at variance with the views which I have expressed above in regard to the easement claimed by the plaintiff.

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BEST, L.J.: By the indenture of 8th March, 1911, defendant granted to plaintiff's predecessors, the International Salt Company, Limited, full power and authority, so far only as the grantor had power to give same, to stop up and divert into the Company's property the water in the stream running down by the fence in Trailcock Lane.

(1) [1907] 1 I.R. 330.

The water in this stream is impregnated with salt from the salt mines in the neighbourhood, and in or about the year 1898 a pipe had been laid along the bank of the stream and above the level of the water in it to convey fresh water for use by the defendant's cattle and for other purposes.

In the year 1910 the International Salt Company, who were in occupation of the lands subsequently conveyed by the deed of 8th March, 1911, renewed the said pipe, but laid it in the bed of the stream, and from that time onward four half-inch pipes connected with the pipe in the stream, of which three supplied drinking troughs for defendant's cattle and the fourth supplied water to an adjoining house.

Any water which passed through the pipe unused had, prior to 1910, flowed on into the Trailcock Lane stream, but on January, 1st 1910, certain parties, who were interested in the use of the water in the pipe, by a document addressed to the International Salt Company consented to the Company joining on a pipe to the existing pipe for the purpose of conveying any surplus water running in the said pipe across the road to their works, the understanding being that the Company were only to have the use of the surplus water in the pipe, but not to have such right in priority to the signatories, and that the Company were only to use such surplus water in such manner as not to interrupt or lessen the flow of water to any of the places theretofore supplied from the said pipe. The original of this consent was destroyed, and a copy was tendered in evidence and proved, but it was objected by plaintiff's counsel that, as the document had not been registered or entered on the folio, its contents were inadmissible in evidence against the plaintiff, a purchaser for value without notice. I think this objection is well founded if it be sought to use the contents for limiting the plaintiff's rights as disclosed in the various documents noted in the folio, but I am of opinon that the contents may be used to show that in fact the water in the pipe was treated as something distinct from the water in the stream running along Trailcock Lane.

At the date of the execution of the said deed there were in existence two wholly distinct entities—one a pipe

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placed in the stream as a substitute for another pipe which previously ran along the bank of the stream, such pipe conveying fresh water applicable to certain defined purposes, and the other entity being the stream itself, in which ran salt water from some mines in the neighbourhood. In these circumstances the learned Judge held that the "water in the stream" which the Company were at liberty to stop up and divert into their own property, included both the water flowing in the pipe in the stream as well as the water flowing in the bed of the stream. I cannot agree with the construction put upon these words.

For a number of years fresh water was conveyed in a pipe running along the bank of the stream, which itself carried along salt water. Later, the pipe was laid in the bed of the stream, but the water it carried was as distinct from the salt water in the stream as when the pipe was laid along the bank of the stream. The purpose for which the fresh water was used underwent no change after the position of the pipe was changed, and I think in the plain and natural meaning of the words it should be held that the water in the stream running down by the fence in Trailcock Lane does not include the water flowing in the pipe which is laid in the stream.

If there be any ambiguity in those words, the defendant is entitled to rely upon his long continued user of the water in the pipe as showing what was present to the mind of both parties to the deed of 8th March, 1911, and that they contracted in reference to the circumstances then existing.

I am, accordingly, of opinion that the declaration of the learned Judge as to this matter was wrong, and that the injunction should be discharged.

It is unnecessary to discuss the argument founded on the alleged excessive user of the water in the pipe by its being used to supply some houses recently erected by defendant, as it is entirely at variance with the main argument put forward on plaintiff's behalf that defendant has no right to any of the water in the pipe, and no cause of action as to excessive user has been pleaded.

The other matter for consideration concerns the water in what was referred to as the "X Y" stream, and arises under the deed of 1st September, 1911. In his

judgment, Mr. Justice Wilson says that what is granted by the deed is the water issuing and coming from the river or stream shown on the map endorsed on that deed. This map only shows the river or stream up to where it meets the aqueduct, and does not show any aqueduct. He then goes on to say that on the construction of this deed and on the oral evidence, especially of Mr. McGonigal, that no water from the aqueduct (except from possible overflow) came down, or issued into, this stream and went down to "X Y," he would have decided that the Company (plaintiff's predecessors in title) were not entitled to insist on the removal of the embankment or to get any of the water in the aqueduct to flow down to "X Y" on the map.

The deed was registered on 5th September, 1911, and on the International Company's Folio No. 7306 there appears an easement, and in defendant's Folio No. 1715 a burden, in terms similar to those contained in the deed, but instead of referring, as is done in the deed, to the water issuing or coming from the river or stream shown on the map endorsed on the deed, the reference is to the river or stream shewn on the Land Registry office maps.

The office map in the case is a copy of the Ordnance Sheet, with certain markings placed thereon. As appears from Mr. Seeds' map, it shows a watercourse down to the point "B," a connecting channel from "B" to "X," and a watercourse from "X" to the county road, but the first watercourse stops short at "B," and is not shown on the office map to run from "B" past defendant's tank down to the county road.

The watercourse, in fact and in nature, runs from "B" past the tank to the county road, and so ran when the deed of 1st September, 1911, was executed, as is shown from the map on that deed and from the clear evidence of defendant's witnesses. It further appears from that evidence that defendant constantly used for every purpose the water which came from "B" past his tank and on to the county road.

If the rights of the parties are to be determined by the deed of 1st September, 1911, and the map endorsed thereon, then plaintiff's action fails, but plaintiff's counsel contend that her rights are determined by the

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entries on the folio taken in conjunction with the office map, and they say that under the Local Registration of Title (Ireland) Act, 1891, these entries are conclusive in her favour.

This is the view taken by Wilson, J., and he granted an injunction against the defendant continuing to divert the water at the point "B" along the watercourse to his tank, and thence to the county road. Counsel for both parties called our attention to every section of the Act which could possibly throw any light on the matter, but there are two sections only which relate to the conclusiveness of the register. The first of these is section 34, which in its opening words provides that the register shall be conclusive evidence of the title of the owner to the land as appearing thereon. This provision relates only to the title of the owner to land, and in section 95 "land" is stated to include all corporeal hereditaments, but no other hereditaments.

There are sections of the Act in which for certain purposes "land" is made to include incorporeal hereditaments, as, for example, sections 19, 20 and 21, but no such provision exists in section 34, and if no provision is made for the register being conclusive as to the title of the owner to incorporeal herditaments, it cannot fairly be contended that it is conclusive as to the nature or extent of those rights.

The other section relating to the conclusiveness of the register is section 57, and is conversant with boundaries. It provides that in the cases enumerated, and after the prescribed notices, the registering authority may, if he thinks fit, enter on the register as conclusive such boundaries, and they shall thereupon be conclusive upon all parties, but in no other case is the description of the land in the register or on the maps conclusive as to the boundaries or extent of the land (see section 55).

If the office maps are not conclusive save in the cases provided for in these two sections as to the boundaries or extent of the land, I am unable to deduce that they are conclusive as to the extent or character of burdens or easements affecting the lands, and I am further unable to

find in any of the other sections to which we were referred any provisions leading to a different result.

I agree, therefore, that the judgment of Wilson, J., as to this matter should be reversed, and that the injunction be discharged.

Solicitors for the plaintiff: *D. O'Rorke & Son.*
Solicitors for the defendant: *Robert Kelly & Son.*

J. McC.

K.B.D.
1929.

June 24
July 8

REX (ALEXANDER STEWART)

v.

THE RECORDER AND JUSTICES OF THE PEACE FOR THE COUNTY OF LONDONDERRY (1).

Fisheries—Statutory liability to erect grating in tail race—Adjoining owner—Trespass—5 & 6 Vic., c. 106, s. 76.

The defendant was fined £5 at Petty Sessions for failing to erect a grating or lattice across the tail race of his mill at a point where the tail race re-enters the river "F." The river "F" is a river in which there are salmon. For a certain distance before and at the point where the tail race re-enters this river it is bounded on both sides by lands that belong to an adjoining owner, and not to the defendant, the owner of the mill. There was no grating or lattice on the tail race where it diverged from or re-entered the river; to construct the grating or lattice, it would be necessary to erect piers that would project into the banks, on the side of the tail race, the property of the adjoining owner. The defendant had started the necessary work of erecting the grating, but had abandoned it in consequence of the objection of the adjoining owner to any trespass on his lands. The defendant had the use of the tail race from the moment it left his own lands until it reached the river.

The defendant appealed to the Recorder of L.

It was contended, on behalf of the defendant, before the Recorder that where a trespass on adjoining property was necessary in order to erect a grating, the person occupying the watercourse within the meaning of section 76 of 5 & 6 Vic., c. 106, could not be compelled to erect the grating.

The Recorder of L. *held* that the defendant's contention that the erection of the lattice involved a trespass on an adjoining owner was no answer to a prosecution under section 76 of 5 & 6 Vic., c. 106, and confirmed the conviction.

The matter came before the King's Bench Division on June 24th, 1929, on a motion to make absolute a conditional order for a writ of certiorari. The King's Bench Division adjourned the further hearing of the motion, and directed that the conditional order and the order adjourning the motion should be served on the adjoining owner to enable him to assert or defend his title.

The motion came on again for further hearing on July 8th, 1929, the adjoining owner being represented by counsel.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the defendant was under a statutory obligation to erect the grating even though it entailed an interference with the banks of the adjoining owner, that the Recorder was right in point of law in affirming the decision of the Magistrates and that the motion should be refused and the conditional order discharged.

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

MOTION to make absolute a conditional order that a writ of certiorari should issue directed to the Recorder and Justices for the County of Londonderry, to remove into the King's Bench Division for the purpose of being quashed the order and adjudication of the Recorder made at Londonderry on 8th January, 1929, on the hearing of an appeal by the prosecutor, Alexander Stewart, from an order made at Petty Sessions held at Londonderry for the district of Londonderry Liberties on 14th November, 1928, by the Resident Magistrate on the hearing of a complaint designated George Keys, complainant; Alexander Stewart, defendant.

Alexander Stewart was fined £5 for failing to erect a grating or lattice across the tail race of his mill at Ardlough where the tail race re-enters the river Faughan. The river Faughan is a river in which there are salmon, and Alexander Stewart was the owner of the Ardlough corn mill. The motive power of this mill is a mill race, specially constructed for the purpose, which takes a considerable amount of water from the Faughan above the mill and returns it again to the river lower down below the mill. For a certain distance before and where the tail race re-enters the Faughan it is bounded on both sides by lands that belong to a Mr. Stephen Buchanan and not to Mr. Stewart, the owner of the mill. At the hearing before the Recorder, it appeared that there was no grating or lattice on the tail race where it diverges from or re-enters the Faughan. To construct such grating or lattice, it would be necessary to erect piers that would project somewhat into the banks on the side of the tail race, the property of the adjoining owner, Stephen Buchanan. The defendant had actually started the necessary work of erecting the grating, but had abandoned it in consequence of the objection of Stephen Buchanan to any trespass on his lands. Stephen Buchanan stated in evidence that he objected to any such trespass.

Alexander Stewart holds the Ardlough Mill under a conveyance dated 12th April, 1837, the grantee's interest in this conveyance being now vested in him. The predecessor in title of Stephen Buchanan was James Getty. A deed of covenant made between James Getty, of the

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one part, and Matthew Anderson Ballantine and Thomas Ballantine, the predecessors in title of Alexander Stewart, of the other part, and dated 20th March, 1875, contained the recitals set out in the judgments.

Section 76 of 5 & 6 Vic., c. 106, provided for the fixing in watercourses, by the occupier, of a grating to prevent the passage of salmon fry and other small fish into such watercourses, and imposed a penalty not exceeding £10 on every owner, lessee, or occupier failing to do so.

It was contended, on behalf of Alexander Stewart, that where a trespass on adjoining property was necessary in order to erect a grating or lattice the person occupying the watercourse within the meaning of section 76 of 5 & 6 Vic., c. 106, could not be compelled to erect it. The Recorder of Londonderry being of opinion that this contention was no answer to a prosecution under section 76 of 5 & 6 Vic., c. 106, confirmed the conviction.

The motion came on before the King's Bench Division on June 24th, 1929. The King's Bench Division then made the following order:—

It being admitted that the grating in question could only be erected by the construction of weirs on the banks and in the bed of the said tail race alleged to be the property of Stephen Buchanan, and counsel for the prosecutor contending that such would involve a trespass by him as against the said Stephen Buchanan, and counsel for the respondent alleging that under the provisions of the deed of the 12th April, 1837, and the deed of covenant of 20th March, 1875, the execution of such works would not be such trespass as was so alleged, the Court directed that the conditional order and this order should be served by the prosecutor on Stephen Buchanan to enable him to assert or defend his title, if so advised, and that the further hearing of the motion stand adjourned until July 8th, 1929.

MacDermott for the defendant:—

July, 8.

The defendant has no property in the actual bed of the tail race or in the banks of the watercourse. Section 76 of 5 & 6 Vic., c. 106, must be so construed that "occupier" shall mean a person who could do the work without trespassing. The person who should have been

proceeded against is the owner of the adjoining lands. The defendant is asked to violate the rights of a third party. The defendant has no ownership in the bed of the stream. The defendant has only the right to the channel and the water flowing therein. I rely on *Rex (Hosford)* v. *Chairman and Justices of Co. Limerick* (1). The complainant must show that the grating could be put in position without violating the rights of the owner of the adjoining lands. In Maxwell on the Interpretation of Statutes (6th edition), page 501, it is stated that "Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights." In *Mayor of Scarborough* v. *Rural Sanitary Authority of Scarborough* (2) it was held that so much of an order as directed an abatement was bad, for it prescribed an act, the execution of which might involve the committal of a trespass. In *Letterkenny Commissioners* v. *Collins* (3) the decision in *Mayor of Scarborough* v. *Rural Sanitary Authority of Scarborough* (2) was followed. In *London County Council* v. *Brass* (4) the sanitary authority gave notice under s. 7 (2) of the Factory and Workshop Act, 1891, to the owner of a factory to provide certain works as a means of escape in case of fire, and the works specified would, if carried out, involve an act of trespass on other premises, in the occupation of third persons; it was held that the Magistrate ought not to convict the owner for refusing to comply with the notice.

[He also referred to *Taylor* v. *Corporation of St. Helens* (5), and *Wood* v. *Ealing Tenants, Limited* (6).]

Nicholson for Stephen Buchanan:—

Mr. Buchanan objected to the erection of the grating as one of his fields lay below the level of the tail race, and he believed that if the grating were erected the field would be subjected to flooding. I am now instructed on behalf of Mr. Buchanan not to stand strenuously for his rights as regards his lands. He will consent to the

(1) 42 I.L.T.R. 105.
(2) 1 Ex. D. 344.
(3) 28 L.R.I. 235.
(4) 17 T.L.R. 504.
(5) 6 Ch. D. 264.
(6) [1907] 2 K.B. 390.

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erection of a grating by the Fishery Conservators, or by Mr. Stewart, provided his rights are safeguarded.

Lowry K.C. and *McCoy* for the Recorder and Justices of Londonderry:—

The watercourse and all the appurtenances belonging to it are clearly conveyed to the grantee by the deed of 1837. The deed of covenant of 1875 interprets the deed of 1837 in favour of the view that we are putting forward. Regardless of the ownership of the soil, the defendant is entitled to go on either bank for the maintenance of the watercourse. The cases under the Public Health Act, 1875, which have been quoted on behalf of the defendant are clearly distinguishable from the present case. We submit that the defendant's contention is no answer to the present prosecution.

Begley K.C. for the Ministry of Commerce.

MOORE, L.C.J.

MOORE, L.C.J., delivered the judgment of the Court as follows:—

This matter came before us by way of a motion to make absolute a conditional order that a writ of certiorari do issue, directed to the Recorder and Justices for the County of Londonderry, to remove into the King's Bench Division for the purpose of being quashed the order and adjudication of the Recorder made at Londonderry on 8th January, 1929, on the hearing of an appeal by the prosecutor, Alexander Stewart, from an order made at Petty Sessions held at Londonderry for the District of Londonderry Liberties on 14th November, 1928, by the Resident Magistrate then present on the hearing of a complaint designated George Keys, complainant; Alexander Stewart, defendant.

Alexander Stewart was fined £5 for failing to erect a grating or lattice across the tail race of his mill at Ardlough where the tail race re-enters the river Faughan. The river Faughan is a river in which there are salmon, and Alexander Stewart is the owner of the Ardlough corn mill. For a certain distance before the tail race re-enters the Faughan it is bounded on both sides by lands that belong to a Mr. Stephen Buchanan and not to Mr. Stewart,

the owner of the mill. There was no grating or lattice on the tail race where it re-enters the Faughan, or any other place. In order to construct such grating or lattice, it would be necessary to erect piers that would project somewhat into the banks on the side of the tail race, the property of Stephen Buchanan. The defendant had actually started the necessary work of erecting the grating, but had abandoned it in consequence of the objection of Mr. Stephen Buchanan to any trespass on his lands.

The prosecutor appealed to the Recorder of Londonderry, who confirmed the conviction.

Stewart has the right to the use of the tail race from the moment it leaves his own lands until it reaches the river.

Section 76 of 5 & 6 Vic., c. 106, provides that "in all watercourses, cuts, channels, or sluices constructed for the purpose of conveying water from any river frequented by salmon, for the supply of towns, the irrigation of lands, or any other purpose other than the supply of water for navigation, or as a moving power for machinery, or for fish ponds, there shall be placed and fixed by the occupier of such watercourses, cuts, channels, or sluices, at their points of divergence from and return to such river, and above and below such sluices, a grating or lattice (the space between the bars whereof shall not exceed two inches in any place), extending across the whole width of such watercourses, cut, channel, or sluices, and from the bottom of the bed or sill thereof respectively to the level of the highest winter or flood waters; and during the months of March, April and May, and such other periods of the year as the brood or fry of salmon or trout shall be descending the rivers, there shall be placed or stretched over the entire surface of such grating a wire lattice or network of such dimensions as effectually to prevent the admission of salmon fry or other small fish into such watercourses, cuts, channels, or sluices; and the owner, lessee, or occupier of any such premises to which such watercourse leads, or other person making or using or having the care and maintenance of any such watercourse, cut, channel, or sluice, shall secure and fix the said grating, lattice, or wire-

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work in a permanent manner, so as to prevent the same being removed or opened, and shall keep and preserve the same in constant repair, and in case any such owner, lessee, or occupier shall neglect so to do, he shall for every such neglect forfeit and pay any sum not exceeding ten pounds."

That is the liability imposed by the Statute upon the occupier of the watercourse.

A deed of covenant made betweent James Getty, the predecessor in title of Stephen Buchanan, of the one part, and Matthew Anderson Ballantine and Thomas Ballantine, the predecessors in title of Alexander Stewart, of the other part, and dated 20th March, 1875, contained the following recitals:—"Whereas the said Matthew Anderson Ballantine is the owner of a certain tail race in connection with said (Ardlough) mills for the conveyance of the water used in working said mills to the said river Faughan and coloured on the map hereon endorsed 'light blue' and whereas divers differences and disputes have arisen and are now depending between the said parties hereto of the 1st and 2nd parts respectively touching and concerning the said tail race, the said right of way and several other matters and things connected therewith and incidental to the use, enjoyment, repair, condition, and maintenance of the premises." It was also provided that "the said Matthew Anderson Ballantine and Thomas Ballantine, their heirs, executors, administrators, and assigns, shall make or cause to be made at their own expense the said hereinbefore mentioned tail race in manner as delineated and coloured 'light blue' on the map hereon endorsed. That is to say, that they shall make the said tail race a uniform breadth of 15 feet from the letter 'G' on said map to the letter 'H,' that is from the said point 'G' until the said tail race reaches the bridge on said map endorsed, and hereinafter more particularly referred to, and from the arch of said bridge next to and facing the said river Faughan to where the said tail race forms a curve in the said river, that is from the letter 'A' to 'I,' extending from said point 'A' to 'I,' a distance of 109 feet on said map, a breadth of about 18 feet, and from the letter 'I' to 'B' on said map, a distance of 40 feet, and when so made and con-

structed as aforesaid that they the said Matthew Anderson Ballantine and Thomas Ballantine, their heirs, executors, administrators and assigns shall and will at all times hereafter at their own expense keep the said tail race at the same uniform breadth as hereinbefore mentioned and shall and will keep the embankments thereof in good order, repair and condition. And when said embankment shall be so constructed as aforesaid that they the said Matthew Anderson Ballantine and Thomas Ballantine, their heirs, executors, administrators and assigns shall and will for ever hereafter keep the said embankments respectively in good order, repair and condition, and shall, between the embankments from letters 'A' to 'B' and from 'E' to 'F,' for ever hereafter keep and maintain the hereinbefore mentioned uniform breadth of about 18 feet, and shall keep and maintain the said embankments and boundaries hereinbefore described from all encroachment of said tail race and river, provided always, and it is hereby declared and agreed by and between the said parties hereto, that the soil of the said embankments and of the channel of the said tail race within the said embankment shall, when so constructed as aforesaid, be and remain the property of the said James Getty, but subject nevertheless to the same rights of way upon and over which the said way, in the said map coloured 'brown,' in favour of the said Matthew Anderson Ballantine and Thomas Ballantine, their heirs, executors, administrators and assigns, and also to the right of the said Matthew Anderson Ballantine and Thomas Ballantine, their heirs, executors, administrators and assigns to repair and keep in repair the said hereinbefore mentioned embankments, and to cleanse the channel of the said tail race."

The deed of covenant also provided that "the said James Getty doth hereby for himself, his heirs, executors, administrators and assigns covenant, promise and agree to and with the said Matthew Anderson Ballantine and Thomas Ballantine, their heirs, executors, administrators and assigns, that they, the said Matthew Anderson Ballantine and Thomas Ballantine, their heirs, executors, administrators and assigns, well and truly performing the matters and things hereinbefore mentioned from time to

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time as aforesaid, may have, hold and quietly enjoy the said hereinbefore mentioned right of way, and use for the purposes of their mills the waters of the said tail race, without any let, suit or hindrance of him, the said James Getty, his heirs, executors, administrators and assigns, or by or on behalf of any person claiming or deriving title by, through or under the said James Getty, his heirs, executors, administrators, or assigns, or any of them."

I do not think there is any occasion to go into the root of title, viz., the document of 1837, between the predecessors of the parties presently before the Court. That instrument has been interpreted by the parties themselves by the deed of covenant of 20th March, 1875, and that deed governs their present relations.

When I use the expression "present relations" I mean, of course, the relations which existed at the date of the hearing before the Justices.

Although Mr. Nicholson, for Mr. Buchanan, now disclaims any intention of further contesting the right of Mr. Stewart to put up the necessary work involving the embankment, still his original refusal to permit this was the ground of the original defence at Petty Sessions, and I must deal with the case as there presented.

In the first place, I am satisfied on the true construction and general scope of the deed of 1875 that Mr. Stewart is "the occupier" of the tail race within the meaning of the statute. Mr. Buchanan, or his predecessor in title at that date, was equally bound to admit it. Each party to that deed must be taken to know the public statute law of the land then and still in force, viz., that such a tail race must be guarded by a grating or lattice, and that such, by virtue of the statute, is in effect a necessary part of every tail race to which the statute applies. I am prepared to hold that each party must be supposed to have dealt with the tail race with full notice of this liability of "the occupier," and that if the erection of such a grating or lattice involved some slight interference with the banks of the tail race so far as they were in the possession of either party, that it was not in the power of either party to object, for by virtue of the obligation in the statute such necessary portion of the banks became in effect part of the tail race in the occupation of Mr. Stewart.

Were this not so, the occupier of any tail race which runs through the lands of an adjoining owner at the point of divergence from, or return to the river, by securing the collusive opposition of such adjoining owner, could frustrate the whole operation of the Act.

I, therefore, think the learned Recorder was right in point of law in affirming the decision of the Magistrates, and that the motion to make absolute the conditional order for certiorari should be refused, and the order discharged.

Lowry, for the Recorder, asked for costs.

MacDermott contra. This is in the nature of a criminal proceeding—no costs are given. [He referred to *Rex (Hosford)* v. *Chairman and Justices of Co. Limerick* (1).]

MOORE, L.C.J. : We will not make any order as to costs.

MOORE, L.C.J.

Solicitors for Alexander Stewart: *Knox, Gilliland & Babington.*

Solicitors for the Recorder and Justices of Londonderry: *Tillie, McDermott & Munn.*

Solicitor for the Ministry of Commerce: *Chief Crown Solicitor.*

Solicitor for Stephen Buchanan: *Stuart C. Ross.*

J. McC.

(1) 42 I.L.T.R. 105.

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Nov. 13
Dec. 9.

IN RE THE FOREGLEN CO-OPERATIVE AGRICULTURAL SOCIETY, LIMITED (1).
(1928. No. 19.)

Agricultural Society—Winding up—Rules—Allotment of loan guarantee shares to members not applying therefor—Liability of members—Industrial and Provident Societies Act, 1893. (56 *and* 57 *Vic.*, *c.* 39.)

The Foreglen Co-operative Agricultural Society, Limited, was incorporated and registered on 27th February, 1919, under the Industrial and Provident Societies Act, 1893. The committee were empowered by the rules of the Society to obtain loans "to an extent not exceeding such amount as may be authorized by a general meeting." The rules further provided that, for the purpose of securing advances, the Society might issue to every member such number of loan guarantee shares of the nominal value of £1 each as would be equal to the number of ordinary shares held by each such member, and that each member should be bound to apply for, and accept, allotments of such loan guarantee shares when making application for ordinary shares. When the allotment of the ordinary shares of the Society took place, no loan guarantee shares were then issued or applied for.

In consequence of losses which the Society incurred, the committee, in December, 1920, found it necessary to obtain a bank overdraft amounting to £1,700. Subsequent trading proved unsuccessful, and in the year 1925 seven members of the committee gave their personal guarantees to the Northern Banking Company, Limited, in respect of the Society's indebtedness. In December, 1926, notices were sent out convening a special meeting of the Society and intimating that members would be asked to apply for loan guarantee shares, and that, failing applications, such shares would be issued to members to the extent to which they were obliged to accept the same. This meeting was held on 17th December, 1926, and, no applications for loan guarantee shares being received, such shares were forthwith allotted to members in accordance with the terms of the notice convening the meeting.

On 14th February, 1928, an order for the winding up of the Society was made, and the Chief Clerk included in the list of contributories the names of the persons to whom loan guarantee shares had been allotted. The members affected moved to vary the Chief Clerk's Certificate on the ground that they had been wrongly included in the list of contributories. They relied, *inter alia*, on the following contentions :—

(a) That the issue of loan guarantee shares was defective, inasmuch as such shares could only be issued at the same time as the ordinary shares and only for the purpose of securing particular advances about to be made to the Society.

(b) That the loan which had been obtained from the Bank was unauthorized, as it had not been sanctioned by a general meeting as required by the rules.

(c) That no applications for loan guarantee shares had been made as required by the rules or by the general law.

The applicants' motion was dismissed and the Chief Clerk's Certificate was confirmed. From this order a number of contributories appealed.

Held, by the Court of Appeal, affirming the decision of Wilson, J., that the liability of each member to accept loan guarantee shares was an original liability from the time of his joining the Society, and that the appellants were liable, as contributories, in respect of the loan guarantee shares allotted to them.

(1) In the Court of Appeal before Moore, L.C.J., and Andrews, L.J.

C.A. 1929.

In re the FOREGLEN CO-OPERATIVE AGRICULTURAL SOCIETY, LIMITED.

APPEAL against an order of Wilson, J., confirming the Chief Clerk's Certificate, in which the appellants appeared as contributories in respect of loan guarantee shares in the Foreglen Co-operative Agricultural Society, Limited.

The Society was incorporated on 27th February, 1919, and was registered under the Industrial and Provident Societies Act, 1893, the registered office being at Mulderg, Claudy, County Londonderry. The rules adopted were those published by the Irish Agricultural Organisation Society, Limited, Dublin.

The rules material to this report were as follows:

1. (c) "Member" shall mean an individual or a society duly admitted to membership of the Society and holding the requisite amount of shares.

5. Applicants for membership shall pay an entrance fee of one shilling, and subscribe for one or more shares in the Society as the committee may in each case prescribe.

17. For the purpose of securing the repayment, together with interest, of any advances of money for the purposes of the Society, to any person, government department or corporate body who shall make such advance to the Society, the Society may issue to every member, other than a society, such number of shares, hereinafter called loan guarantee shares, as shall be at least equal to the number of ordinary shares held by each such member in the capital of the Society.

The loan guarantee shares so issued shall be shares of the nominal value of £1 each, and shall be subject to the following conditions, viz.:—

(a) Each member shall be bound to apply for, and accept, allotments of all such loan guarantee shares when making application for ordinary shares.

(b) Each member shall, on application, pay one shilling on every loan guarantee share so allotted to him as aforesaid, and shall not be liable to pay up any portion of the balance uncalled on foot of such share, unless and until the Society is wound up or a call thereon is authorized by a resolution of a special general meeting of the Society to meet any liability incurred by the guarantors of the Society and in pursuance of a request by such guarantors and with their consent.

(c) On the voluntary or compulsory winding up of the Society each member shall be liable and bound to pay up such portion of the balance uncalled on foot of each such loan guarantee share held by him as may be necessary to repay to any person who has advanced money to the Society as aforesaid, the amount due on foot of such advance and interest as aforesaid.

21. Application for shares shall, in the case of individuals, be made in Forms I and II prescribed in the Appendix.

25. The committee may obtain loans for the purposes of the Society from members or other persons on the security of bonds, agreements, promissory notes, or mortgages, to an extent not exceeding such amount as may be authorized by a general meeting of the Society, for such periods as they deem expedient.

29. A special general meeting may be convened by the committee . . .

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The first issue of ordinary shares took place in March, 1919, but no loan guarantee shares were then issued or applied for. The business of the Society was mainly carried on by a committee. It was found necessary, at an early stage, to obtain an overdraft, and accordingly, in December, 1920, an advance, amounting to £1,700, was obtained from the Northern Banking Company, Limited. Subsequent trading resulted in further losses being incurred, and in the year 1925 eight members of the Committee were obliged to give their personal guarantees to the Bank in respect of the overdraft of £1,700. Eventually a notice was sent out convening a special meeting "for considering the present position of the Society," and containing the following intimation:— "Members will be asked to apply for loan guarantee shares and, failing application from members, loan guarantee shares will be issued to the various members, whether application has been made or not, to the extent to which members are obliged to accept same." The meeting convened by this notice was held on 17th December, 1926, and a resolution was passed to the effect that members should be asked to apply for loan guarantee shares, and that failing applications such shares should be issued. No applications were received, and accordingly the names of the original subscribers were read out, and the secretary entered the appropriate number of loan guarantee shares then issued opposite each name.

On 14th February, 1928, an order was made for the compulsory winding up of the Society.

In the course of the liquidation the persons to whom loan guarantee shares had been allotted at the meeting of the 17th December, 1926, were placed in the Chief Clerk's Certificate as contributories. An application to vary the Chief Clerk's Certificate was refused by Mr Justice Wilson, and from his order a number of shareholders appealed.

McGonigal K.C. and *Nicholson* for twenty-five appellants.

McCoy for nine appellants.

The liability of members can only be founded upon contract. *Biddulph and District Agricultural Society* v.

Agricultural Wholesale Society (1). In the present case the essential elements of a binding contract between the Society and its members are all absent so far as the allotment of the loan guarantee shares is concerned. There was no offer and acceptance and no communication of acceptance in the form of notices of allotment.

Under rule 17 members are only obliged to apply for loan guarantee shares when making application for ordinary shares. There is no power to issue them seven years later, nor has the Society any power to allot such shares without applications being made for them.

Rule 17 only enables loan guarantee shares to be issued for the purpose of securing the repayment of a particular advance, about to be made, and not for the purpose of liquidating debts already incurred.

The loan which had been obtained from the Bank was unauthorized, inasmuch as it had not been sanctioned by a general meeting, as required by rule 25.

In any event the allotment of loan guarantee shares was defective by reason of the fact that the meeting of 17th December, 1926, at which it was made, was convened at the request of the persons who had guaranteed the Bank and not by the committee, as required by rule 29.

Murphy K.C. and *MacDermott* for the respondent (the official liquidator).

The proper construction of rule 17 (a) is that when a person makes application for ordinary shares, and becomes a member by being allotted such shares, he incurs a liability to make application for and accept loan guarantee shares at any time thereafter.

Under rule 17 loan guarantee shares, if issued, must be issued to every member. If, as is contended on behalf of the appellants, such shares can only be issued to members at the time when they subscribe for their ordinary shares, then no loan guarantee shares could ever be issued to secure an advance to the Society.

In view of the fact that the Bank have proved as creditors, and that their position as such has not been challenged, the argument that the advance obtained from the Bank was invalid under the rules is not open to the appellants. *Cur. adv. vult.*

(1) [1927] A.C. 76.

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In re the FOREGLEN CO-OPERATIVE AGRICULTURAL SOCIETY, LIMITED.

Moore, L.C.J. Dec. 9.

MOORE, L.C.J.: This is an appeal against the Order of Mr. Justice Wilson, dated 25th June, whereby he refused to vary the Certificate of the Chief Clerk, in which the appellants appear as contributories in their own right in respect of loan guarantee shares in the Foreglen Co-operative Agricultural Society, Ltd.

The Foreglen Society was duly incorporated and registered on 27th February, 1919, under The Industrial and Provident Societies Act, 1893; its registered office was at Mulderg, Claudy, County Londonderry. Putting it in ordinary terms, the object of the Society was mainly the setting up and working of a scutch mill, and the ordinary shares were of the value of one pound each. Rules governing the organization and management of the Society were adopted, to which it will become necessary that I shall presently refer. The business of the Society was mainly carried on by a committee under the powers of the rules, for example, rules 25 and 42.

At an early date the committee found it necessary to resort to the Northern Bank to procure an overdraft, and it appears from their minutes of the meeting of 10th December, 1920, that the amount of overdraft to be applied for was £1,700.

Trading was carried on by the Society in succeeding years, but with little success. As appears from the report of Mr. James Baird, who was appointed by the Ministry of Commerce to investigate the affairs of the Society, there were losses in each of the years 1921-1927 (with the sole exception of the year 1923, when a profit was shown of £48 11s 7d), amounting to several hundred pounds for each of such years.

In the year 1925 the petitioner in the present case and seven other members were obliged to give their personal guarantee to the Bank for the £1,700 overdraft.

Eventually, things became so bad that the Secretary, Mr. Robert T. Marshall, was instructed to send out a notice convening a special meeting of members "for considering the present position of the Society," with the following intimation: "Members will be asked to apply for loan guarantee shares and, failing application from members, loan guarantee shares will be issued to

the various members, whether application has been made or not, to the extent to which members are obliged to accept same." I shall, of course, have to deal with this at a later stage. The notice was dated 10th December, and the meeting was, in due course, held on 17th December, 1926.

Under rule 31 the quorum of members attending such a meeting is fixed at not less than ten members, and, as a matter of evidence, there has been a conflict of testimony as to the number actually present at this meeting.

It is alleged by some of the appellants that only nine members were present, but these statements, though on oath, are made three years after the event, and I prefer to act on the testimony of the minute of the meeting regularly adopted and signed as correct at the following meeting, in which it is stated that twelve persons were present.

The meeting passed the following resolution, and I take it from the minutes:

> "Members were asked for loan guarantee shares and, failing applications from members, shares were issued to members whether application had been made of not.
>
> Proposed by James McCloskey, and seconded by James Brown, and passed unanimously."

These minutes are quite inartistic, but we are dealing with an agricultural community, some, at least, of whom, as appears from the voluminous mass of documents in the case, were illiterate and sign as marksmen, and we have to get at what the minutes really represent.

This, I take it, was an actual resolution more or less in the terms in which the notice summoning the meeting had been expressed, and I think we should give effect to what we conceive to be the real event portrayed as above.

It appears from the evidence that the names of the original subscribers entered on the Society's register were read out, and the secretary thereupon or immediately afterwards, in pursuance of the decision, entered on the Register the appropriate number of loan guarantee shares then issued, with one or two exceptions, opposite each

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name. They were there so found when the liquidator, subsequently appointed by order of Mr Justice Wilson of the 14th February, 1928, went into possession of the assets of the Society, and they were accordingly returned as contributories by the Chief Clerk in his Certificate, and this is the subject of the present appeal.

We have been informed that there are on the register one hundred and eighteen of such contributories, that fifty-two were represented on the motion to vary the Certificate in this respect before Mr. Justice Wilson, and we now know that this appeal concerns thirty-four of them, represented by Mr. McGonigal and Mr. M'Coy.

The liquidator takes his stand upon the validity of the proceedings at this meeting of the Society on 17th December, 1926, and the whole case turns on the question whether or not it was an authorised exercise of the powers of the Society.

A large amount of evidence is found in the appeal book to the effect that the deponents for the most part admitting that they were ordinary members of the Society, had no knowledge of the existence of any possible liability under the provision in the rules for the issue of the loan guarantee shares, for which they severally had never made any application.

In my opinion, this volume of evidence is entirely irrelevant. Fraud is not alleged in this case, and there can be no suggestion of mutual mistake, and mere ignorance of the rules can not be a defence for any of the members of the Society when a lawful call in respect of a lawful liability is made. Were it otherwise, the business of these Societies in a somewhat backward community—using the expression only in connection with their prevalent lack of acquaintanceship with statutory and commercial relations—could not be carried on. But, in my judgment, the matter is disposed of by section 22 of the Act of 1923—"The rules of a registered society shall bind the society and all members thereof . . . . to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of each member, his heirs, executors, administrators and assigns, to conform thereto, subject to the provisions of this Act."

I, therefore, proceed to enquire what, under the rules, were the liabilities of members.

I should say, first of all, that I find these rules somewhat loosely drawn; they seem to be inelastic, in some places almost inconsistent, and with many omissions of provisions for events which might arise. Again, too, I remember that we are dealing with conditions of affairs applicable to a country community and not to financiers of Threadneedle Street.

A "Member" of the Society shall mean an individual or a society admitted to membership of the Society and holding the requisite number of shares. This is the definition in rule 1. It is true that under rule 5 the committee of management are to consider admission, and that an entrance fee is to be paid; that a member must apply for shares under rule 17 and notice of his admission to the Society under rule 21 must be sent to him within one week, and there may be other conditions as to which the evidence before us is silent in respect of their performance, but if I find a person who has paid money to the Society on the register of shareholders constituted under rule 19, I think he must be treated as a member accepted by the Society, whether there is evidence or not of these preliminaries having been complied with or not.

I, therefore, treat the appellants, all of whom were subscribers to the Society and are on the register, as members of the Society, and proceed to enquire how the rules apply to them as such.

Here let me say a word about the general scheme of the rules so far as the capital of the Society is concerned.

Some Limited Companies, e.g., Banks, issue shares, say, of twenty pounds each, with five pounds paid up. If occasion arises they make calls upon the unpaid amount of fifteen pounds. The Foreglen Society, under its rules, arrived at much the same result by a different method. Shares were divided into two classes, and under rule 17 it was obligatory on each member to be a holder of shares in amounts to be fixed by the committee under rules 5 and 16, and the proportion as between each member's holding of each class of share was also to be fixed by the committee, but under the first part of rule 17 such proportion was not to be less than an equality between the

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respective holdings of each class of shares in each member. The two classes of shares were what are called the ordinary shares, and the loan guarantee shares. The ordinary shares were what I may call proprietary shares, and, had the Society been prosperous, would have participated in the profit (rule 16). The loan guarantee shares were purely a liability, imposed on the members to provide a fund to form a security against borrowing, and thereby to facilitate borrowing for the purposes of the Society.

Under rule 17 (a), which has been discussed before us, it was obligatory on each member, when applying for ordinary shares, also to apply for and accept an allotment of loan guarantee shares.

In the case of the appellants, this has not been done, and it is urged that the effect of this omission on their part has been to release them from all present liability. The first part of their case stands or falls by our view on this.

The rule assumes that every member shall apply for ordinary shares, and that such application shall, under rule 21, be in the form No. 1 in the appendix. Now, what is the effect of this? Application for membership is most important in deciding the question in an ordinary company, whether or not an individual has offered to join the company, and because his membership would, in the main, depend upon the acceptance of such offer. But even in the case of such company it is possible to establish the fact of membership by the course of dealings between the individual and the company without any proof of a formal application for membership.

I think, in the case of a member of a society such as the present, the necessity for such an application is not so essential. Once he has joined the Society and paid his money, as all the appellants here appear to have done, it was open to the committee to proceed to allotment under rule 21 without any application, and I think the member (who must be a person holding shares under the definition I have read) would remain equally bound to accept such shares under rule 17 (a) as if he had made formal application.

It is, therefore, immaterial, so far as his liability is concerned, whether or not a member made formal application for ordinary shares once they were allotted to him and he was placed on the register in respect of them.

Now, I can not see any distinction under the rules between the liability to become a shareholder in respect of ordinary shares, and in respect of loan guarantee shares. This is the necessary effect of rule 17. The only difference arises on the facts in the present case, which difference is that the ordinary shares were in each case allotted to the appellants on their becoming members, whereas the loan guarantee shares were not so allotted until December, 1926. But we still come back to the fundamental scheme of the Society, that members could not accept the potential profits of the ordinary shares without the corresponding liability carried by the loan guarantee shares. I am, therefore, of opinion that they could be legally allotted at any time, though this should have been done *pari passu* with the allotment of the ordinary shares.

But Mr. McGonigal has pressed upon us a contention, under the earlier part of rule 17, that the Society, as such, must first create an issue of the loan guarantee shares before they can be allotted, and that it is a fatal objection to valid allotment when no such issue has been made.

On consideration of the rules I do not think this is sound.

This arises from the difference between the basis of the formation of an ordinary company and a society such as the present. An ordinary limited company has its share capital limited by its articles of agreement. They issue shares or stock within their powers as so fixed and defined. In the case of a society such as the Foreglen, these considerations do not apply. As was pointed out in *Biddulph and District Agricultural Society* v. *Agricultural Wholesale Society* (1), where the distinction generally is drawn between a company and a friendly society, the conditions governing the society are partly statutory and partly contractual.

(1) [1927] A.C. 76.

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The Company can only offer its shareholders shares or stock up to a limited amount, governed by the conditions of its constitution; in the case of this Society the capital to be subscribed for in one pound shares was unlimited. (See rule 16.) There is no provision for the issue of such shares in the sense of creating such an issue; their existence is implied by the rules themselves; they are acquired by the member to qualify him as such by simple allotment after the other conditions have or have not been complied with. Why should there be under the rules any distinction between ordinary and loan guarantee shares so far as issuing them is concerned, when it is obligatory on the member to accept both? In my opinion, notwithstanding the expression in rule 17, "The Society may issue to a member," the existing creation of such shares is already assumed by the rules themselves. In the case of a company shares are issued—meaning offered for subscription, but this is to the public or to a class of subscribers as a whole, not to an individual member. To him, after his application has been accepted, they are in ordinary parlance not "issued," but "allotted." I think this expression in these rules means nothing more than that the Society may allot such shares to an approved member, and that such allotment on behalf of the Society is to be carried out according to the rules of the Society, namely, by its own committee (rule 21).

The next objection was that, admittedly, no notice of such allotment was ever received by the appellants. There is a Circuit case, *Clondrohid Co-operative Dairy Society, Ltd*, v. *Lucey and Kelleher* (1), a decision of the Lord Chief Baron in support of this view. This, though a decision of Palles, C.B., does not necessarily conclude the present case. Each must depend on its facts. On examination of this case, which apparently is summarised by the Editor, the facts are not fully stated if it is the same case as is reported at page 342 of the same volume of the "Irish Law Times," where it would appear that there had been a verbal repudiation of membership before allotment. If the subscriber accepted his membership of the company by subsequent acts without repudiation, I do not think the absence of notice is fatal. The notice of allotment is merely the communication of the accept-

(1) 30 I.L.T. 150 (note).

ance. This is the most convenient way of proving the completed contract. But the completion of the contract, if in fact in took place, can be proved in other ways. If, for instance, a subscriber accepted the fact that he was registered as a shareholder and accepted that status whether by right of dividends, payment of calls or otherwise, no one at a later date would listen to an argument on his behalf that he was not a member, because he had not received a notice of allotment. *In re The New Theatre Company, Limited. Bloxam's Case* (1). In this case, which was an appeal from the Master of the Rolls on the same lines as the present and was heard by Turner and Knight Bruce, L.J.J., there was a liability to pay two pounds on allotment of the shares, just as here there was a liability to accept the loan guarantee shares. The appellant did not pay the two pounds, and subsequently, in consequence, challenged the validity of the allotment because he had not done so. Turner, L.J., said that if such contention were to succeed the appellant would be taking advantage of his own wrong.

The appellant also challenged the allotment on the further ground that no notice thereof had been given to him, a contention also raised before us. The Lord Justice says:—"It was said on his part that he had no notice of the allotment. I think the contract became perfect and binding upon the appellant when the allotment was made, and that notice of the allotment was not necessary to perfect the contract, more especially as the appellant knew the allotment was about to be made."

Knight Bruce, L.J., concurred.

Bloxham's Case (1) has been frequently considered and referred to, and I can not find that it has been over-ruled, but it must be remembered that most of this class of case depend upon the particular facts of each.

But the present is not the case of a company but of a friendly society, and under these rules it is not a matter of accepting allotted shares, or the reverse. Once an individual becomes a member it is obligatory on him to accept such shares of either class as he may be allotted. Therefore, I think notice of the allotment to him by the

(1) 4 De G. J. & S. 452.

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society is not necessarily one of the essentials to his statutory contract to take the shares, because the rules of the society give him no option to accept or to refuse. Hence I think that this point fails likewise.

Holding, therefore, as I do, that the liability of each member to take up these loan guarantee shares was an original liability attaching to each individual from the moment of his joining the Society, I can not say that their subsequent allotment in any way so altered the status of the members that the assent of any members or of a majority of members to the resolution passed at the general meeting of the Society on 17th December, 1926, was necessary or essential. This takes this case out of the doubt raised in *Biddulph and District Agricultural Society* v. *Agricultural Wholesale Society* (1), and also, I think, relieves me from considering any possible conflict in the opinions in Mr. Palmer's work respectively referred to by Mr. McGonigal and Mr. Murphy.

In my opinion this really decides the only question raised by this appeal. Are the appellants rightfully on the list of contributories?

However, we listened to Counsel for the appellants at considerable length in their contention that the amount of the overdraft to the Northern Bank was a debt of the committee to the Society because it had been incurred by the committee to an extent not authorised by a general meeting under rule 25, and out of respect to them I cannot pass over the subject. This debt, as between the Bank and the Society, has been found to be an existing debt, and as such has been included in the Certificate of the Chief Clerk. But if the contention succeeds that the committee acted *ultra vires* rule 25 in incurring it, then as between themselves and the Society in the absence of ratification by the Society, they might be held liable to indemnify the Society to the extent of the debt. This would surely require a substantive and independent motion before the learned Judge of first instance; I mean something in the nature of a misfeasance summons. Such has never been brought, and I have no means of knowing whether it will ever be brought. So far as I

(1) [1927] A.C. 76.

know the question has not been argued before him, and certainly, if it were so argued, his judgment is silent on the point. This question, affecting the rights of persons once found to be contributories, is quite distinct from the only question raised before us by the notice of appeal as to whether such persons should be held to be contributories at all, and, in my opinion, our judgment on this appeal could not preclude the second question from being subsequently raised by any of the remaining contributories. At present, therefore, I decline to express any concluded opinion as to the validity of this loan as between the committee and the members of the Society, or upon the contention that assuming it to be in its inception unauthorised by the constitution of the Society, it was subsequently accepted or ratified by the Society.

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This again postpones our decision of the question of the particular amount of assent, whether it be on the part of individual members or of a majority of them, or by a universal vote from all of them, which may be legally necessary for such ratification; I merely say it is not at present before us.

I think, consequently, that for all these reasons the judgment of Mr. Justice Wilson was right and should be affirmed, and that this appeal should be dismissed with costs.

Andrews, L.J.: If this case were to be decided by sympathy, my decision would undoubtedly be in favour of the appellants. It is not to be understood from this that I accept implicitly the truth of all the statements contained in their affidavits; but, enough is admitted, or, at least, stands uncontradicted, to satisfy me that their present unfortunate position, from which I regret that I am unable to give them any relief, is in a large measure the outcome of misplaced confidence in the promoters or organisers of the Society who canvassed for members, and in the committee and officials of the Society, whose mismanagement of its affairs is largely responsible for its present liquidation.

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I shall not attempt to review the evidence at length, but I shall summarize the salient points which have been established to my satisfaction. Members or shareholders

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were obtained without full, or, indeed, any proper disclosure being made to them of the liabilities which they were incurring. No copies of the rules of the Society were handed to them as provided by rule 63, or read over to them at the time that they sought membership; and I think it is probably true that many of them never received copies at any time. Indeed, the very large majority of the members had been enrolled before the committee on 20th March, 1919, authorised the secretary to purchase rule books from the Irish Agricultural Organisation Society, Limited. In these circumstances it is not to be wondered at that, from the beginning, many of the rules were consistently ignored. Applications for ordinary shares were not made in the forms set out in the appendix to the rules. No notices of admission to membership, allotment letters or scrip were sent to the applicants. Of still greater consequence in the facts of the present case, applicants were not told at the time of their seeking membership, or for many years afterwards, of the Society's right to issue loan guarantee shares, or of the nature or extent of the members' contingent liabilities in respect thereof. Neither balance sheet nor auditor's report was hung up in the Society's office, as required by the rules. Annual meetings were held at irregular intervals, and none were held at all in the calendar years 1923 and 1926. With the exception of one year, the business of the Society was conducted at a loss; yet, as the auditor of the Ministry of Commerce held in his report of 6th December, 1927, the members of the Society were not made fully aware of the continued losses sustained by the Society. Of vital importance, also, to the present case was the fact that the committee failed to procure the Society's sanction at a general meeting to their obtaining loans from the Bank, as required by rule 25. The committee procured these loans on their own personal guarantee; and the principal object of these proceedings is to enable their liability to the Bank to be extended to and spread over the general body of the shareholders by obtaining payment of the uncalled capital of the loan guarantee shares. Other irregularities could be mentioned, but the above will suffice to show the manner in which the affairs of the Society were managed, or, as I

would prefer to say, mismanaged, by the officials and committee into whose charge its destinies were entrusted. I feel it is due to the appellants that these facts should be mentioned.

The question, however, which we are called upon to decide is whether these facts constitute in law a defence to the liquidator's claim to have the appellants placed with other shareholders on the list of contributories in respect of their loan guarantee shares, it being always borne in mind that by section 22 of The Industrial and Provident Societies Act, 1893, it is provided that "the rules of a registered society shall bind the society and all members thereof . . . . to the same extent as if each member had subscribed his name and affixed his seal thereto."

The arguments advanced on behalf of the appellants may, I think, be summarised as follows:—

(1) It was contended that the issue of these loan guarantee shares was defective, inasmuch as:—

(a) There was no power to issue them seven years after the formation and registration of the Society, as same should have been issued, if at all, at the same time as the ordinary shares.

(b) That they could only be issued as security for the repayment of particular advances of money then about to be made, and not as security for or as a means of liquidating a debt, such as the Bank's, which had been previously incurred. And

(c) That the loan which had been obtained from the Bank was unauthorized, as it had never been sanctioned by a general meeting of the Society, as provided by rule 25.

(2) It was contended that the allotment to the appellants was defective, inasmuch as:—

(a) No applications had been made for the shares, as required both by the general law and by rules 17 and 21.

(b) That the meeting of 17th December, 1926, at which the allotment was made was irregular, as it was convened at the request of the guarantors to the Bank instead of the committee, as required by rule 29; that it was not attended by ten mem-

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bers, the minimum number requisite under rule 31 to constitute a quorum; and that it was a special general meeting of the Society, whereas an allotment should have been made under rule 21 by the committee. And

(c) That no notice of allotment of the shares was given to the appellants, as required both by the general law and by rule 21 of the Society.

I propose to take these arguments seriatim.

As to 1 (*a*). This argument is based on the particular wording of condition (a) in rule 17, which states that each member shall be bound to apply for and accept allotments of all such loan guarantee shares *when making application* for ordinary shares. The rule is, like others, extremely badly drawn. If the words which I have italicized are to be interpreted literally as meaning that the applications for ordinary and loan guarantee shares must be made simultaneously—at the same moment of time—difficulties and absurdities arise in interpreting other parts of the rule. Thus, as application and subscription for ordinary shares must be made at the time of application for membership (rules 5 and 21), the word "member" in condition (a) of rule 17 would have to be read as if it were "applicant for membership." Again, the making of advances to the society, for the purpose of securing which loan guarantee shares may be issued, is spoken of in the language of futurity—"who *shall* make such advance to the Society." This seems to me necessarily to involve the existence of a right on the part of the Society to issue these loan guarantee shares at a date subsequent to the enrolment of members and the issuing of ordinary shares to them. The same idea of an issue of loan guarantee shares at a point of time subsequent to the issue of ordinary shares is to be found in the subsequent words of the rule, especially those which I have italicized—"may issue to every *member* . . . . such number of shares hereinafter called loan guarantee shares as *shall be* at least equal to the number of ordinary shares *held* by each such member."

There is obviously, therefore, an inconsistency between the substantive part of rule 17 and the wording of condition (a) if we assign to it the meaning contended for

by the appellants; and in such conflict it appears to me that the general body of the rule must prevail, and the words "when making application for ordinary shares" must be construed merely as descriptive of a member who has applied for ordinary shares, rather than as referring to the particular moment of time at which the application for ordinary shares is made.

I would merely add that the construction which I have put upon this rule as a whole is not only that which, in my opinion, does least violence to any part of it, but also that which best accords with what I conceive to have been the intention of its framers; for it is not possible from the very nature of a trading society such as this that, as Mr. McGonigal contends, it should be determined once and for all, either by the special members before registration or immediately upon enrolment of the general body of members, whether the business of the Society was throughout its existence to be conducted on a purely cash basis or whether the vicissitudes of trade might at some future date necessitate borrowings, to secure which the issue of loan guarantee shares would be required. The power to issue these shares is by the express terms of the rule vested in "the Society," not in its special members, and this appears to me to involve at the moment of issue not only the existence of registration of the Society but the due enrolment of at least a sufficient number of ordinary members to constitute a valid meeting of the Society within the rules.

As to 1 (*b*). I have searched in vain throughout the rules to find any words which would indicate that the issue of loan guarantee shares can only be made to secure the repayment of a particular prospective advance. It would in my opinion be quite unreasonable to say that before obtaining a loan the Society must create and give a security, such as these loan guarantee shares, necessarily affecting the general body of shareholders, which was not asked for by the lender, and which might never be required; and that if they failed then to do so they should be debarred for all time from doing so, with the inevitable consequence that the committee would be obliged to continue to shoulder a personal burden which they had voluntarily undertaken in ease of their fellow-shareholders,

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As to 1 (*c*). This contention—that the loan from the Bank was never authorized by a general meeting of the Society—has caused me some difficulty. It is not in my opinion a sufficient answer to say that the loan must be regarded as having been authorized by the Society merely because in these proceedings the Bank's debt has been proved; for the position of the Bank, as a third party independent of the Society, is quite different from that of the Society's own members. The rule in *Royal British Bank* v. *Turquand* (1), which is based on the principle of convenience, is well recognised. Whilst persons dealing with a company are bound by the provisions of any Acts of Parliament, whether general or special, by which it is regulated and by registered documents, and are obliged to see that the proposed dealing is not inconsistent therewith, they are not bound to inquire into the regularity of the internal proceedings—what Lord Hatherley called "the indoor management." They are entitled to assume that all such proceedings are being conducted regularly; and so, where the articles of association of a company give power to borrow with the sanction of a general meeting, a lender need not inquire whether such sanction has in fact been obtained.

The legal position of shareholders of a company and of members of a society in regard to such matters is, however, wholly different; and acts which under the articles or rules must be done by the company or society in general meeting cannot be validly done by the directors or committee so as to bind their shareholders or members. And so, in the present case, where rule 25 empowers the committee to obtain loans to an extent not exceeding such amount as may be authorised by a general meeting of the Society, the initial step of fixing the limit of the committee's power of borrowing should be taken by the Society in general meeting. Admittedly, this was not done before the advances were obtained from the Bank.

It is, however, submitted on behalf of the liquidator that, assuming this irregularity to have taken place, it was set right and the committee's action was ratified by the subsequent conduct of the members. The law is well settled that if an act done by the directors of a company

(1) 6 El. & Bl. 327.

is *ultra vires* the company it cannot be validated either by a resolution passed at a general meeting of the shareholders or even by the assent of every individual shareholder. *In re George Newman & Co.* (1) On the other hand, if a transaction be carried out by directors which is *ultra vires* of them but is *intra vires* of the company, it can be ratified by acquiescence, provided the shareholders had knowledge of the facts or the means of knowledge were available to them. *Grant* v. *United Kingdom Switchback Railways Co.* (2), *Irvine* v. *Union Bank of Australia* (3), and *Re The Phosphate of Lime Company, Limited* v. *Green & Anor* (4). The latter case has a special bearing on the present; for it not only establishes that the opportunity and means of knowledge, if they thought proper to inquire, may take the place of actual knowledge on the part of the shareholders, but it also lays down in unambiguous language that to shew assent and acquiescence it is not necessary (or possible) to prove the acquiescence of each individual shareholder. It is enough to shew circumstances which are reasonably calculated to satisfy the Court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry. The point is shortly put by Brett, J., in his judgment when, after citing a passage to the same effect from the speech of Lord St. Leonards in *Spackman* v. *Evans* (5), he said:—"It is impossible to prove that every shareholder had notice or such a knowledge of the facts as amounts to notice. It is sufficient to shew that facts were made known to the shareholders, into the effect of which they might and ought to have inquired, and to which they ought to have objected at the time, unless they intended to adopt the transaction." The interlocutory observation of Willes, J., is to the like effect.

The cases of *In re Express Engineering Works* (6) and *Parker & Cooper, Ltd.* v. *Reading* (7) were relied upon by Mr. McGonigal in support of the proposition that it is necessary to secure the individual assent of every share-

(1) [1895] 1 Ch. 674.
(2) 40 Ch D. 135.
(3) 2 A.C. 366.
(4) L.R. 7. C.P. 43.
(5) L.R. 3 H.L. 222.
(6) [1920] 1 Ch. 466.
(7) [1926] Ch. 975.

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holder in order to constitute a valid ratification. I have carefully considered both these cases and cannot find that they are authorities for any such general proposition as is contended for. In both these cases all the shareholders no doubt did assent and ratification was established. It is to be observed, however, that in neither of these cases had a meeting of the shareholders been held; and neither decision, nor even the dicta in any of the judgments, go further than this, that, where no meeting of the shareholders has been held, the assent of all the individual shareholders obtained separately will have the same effect in ratifying a transaction which is *intra vires* the company as would a resolution passed in the ordinary way at a duly convened meeting of the shareholders.

This brings me then to a question of fact. In the words of Brett, J.:—"Were facts made known to the shareholders into the effect of which they might and ought to have inquired, and to which they ought to have objected at the time unless they intended to adopt the transaction?" In my opinion the answer to this question must be in the affirmative unless I am to hold that the Society's annual balance sheets which are in evidence have been fraudulently prepared for the purpose of these proceedings, and that the signed Minutes of their annual meetings are a grossly inaccurate record of the proceedings. This I am not prepared to do. The Society was registered in February, 1919. It was agreed to obtain an overdraft for £1,200 from the Bank at a meeting of committee held on 2nd January, 1920. The first annual meeting was held on 1st October, 1920, at which, according to the minutes, a balance sheet, which set out an overdraft, was read to the shareholders. At a committee meeting of 10th December, 1920, it was decided to increase the overdraft to £1,700, so that it reached this its highest figure at this early stage of the Society's history. The next annual meeting was held on 10th November, 1921, at which, according to the minutes, a balance sheet, which referred to an overdraft, was read and explained and agreed to by shareholders. Further annual meetings were held on 8th December, 1922, 15th February, 1924, 30th March, 1925, all before the date upon which the issue of loan guarantee shares was first mooted, at all

of which the balance sheet was, according to the minutes, read and explained; and the minutes also contain references to the fact that certain of these balance sheets and auditors' reports had been proposed, seconded, and passed unanimously. What is the answer which the appellants make to these facts? It is not that no such balance sheets were presented to the meetings, but it is alleged that they were read when the shareholders were assembling, thus rendering them impossible to follow. If there is any truth in this statement, which I very much doubt, I think the more probable explanation is that such shareholders arrived late after the meetings had commenced at the appointed hour. I hold, therefore, that the shareholders had either actual knowledge of the existence of this overdraft for several years, or they had the means of knowing all about it if they had chosen to inquire into it. I am further of opinion that the minutes, which contain no reference to any objections by shareholders to the overdraft, are correct, and the shareholders must, accordingly, be taken, especially after the lapse of such a period of time, to have approved of and ratified the loan. My conclusions, I may add, seem to me to accord with the probabilities of the case; for it is difficult, if not impossible, to conceive how, in a small community such as this, the existence of the Society's Bank overdraft could have been successfully concealed by the committee from the members even if they had made every effort to do so. I, accordingly, hold that the obtaining of the loan from the Bank was duly ratified by the Society's members, and that it is in law as binding on the Society and its members as if it had been previously authorized by them under rule 25.

I shall now deal briefly with the appellants' objections to the allotment of the loan guarantee shares.

As to 2 (*a*) *and* 2 (*c*). *In re Peruvian Railways Co. Crawley's Case, Robinson's Case* (1) is only one of many cases which might be cited in support of the proposition that an allotment of shares must in the ordinary case be preceded by an application and must be followed by a notice of allotment. Mr. McGonigal is quite right when

(1) 4 Ch. App. 322.

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he says that the ordinary principles of the law of contract apply to the allotment of shares. See Judgment of Romilly, M.R., *In re National Savings Bank Association, Hebb's Case* (1). The allotment is simply an acceptance, which, to be binding, must be founded on an offer, and it must be communicated to the person who made the offer. Rules 17 and 21 contemplated that this course would be followed in connection with the allotment of all this Society's shares. But in regard to these loan guarantee shares it was in my opinion not an essential to valid allotment, but merely an indication of a convenient procedure, the adoption of which would prevent possibility of misunderstanding or mistake; for the paramount consideration in connection with these shares was the obligation on all members holding ordinary shares to take, if so required, at least as many loan guarantee shares. If the acceptance of shares by a member is compulsory under the rules no offer (i.e., no application) is necessary. If, in regard to such a matter, that were not deemed to have been done which ought to have been done, the element of compulsion would disappear. So, too, if the object of a notice of allotment be, as it is, to conclude the contract, and to put an end to the right of the applicant to withdraw his application, it seems to me that where no right of withdrawal exists, as in the case of these loan guarantee shares, no notice of allotment is necessary. There is no necessity to tell a man that he can no longer do that which he never had a right to do. These arguments, therefore, also fail.

It only remains to consider the alleged irreguarities in connection with the allotment at the meeting of 17th December, 1926, referred to in argument 2 (b). In the first place, it would be quite impossible to hold that the business transacted at that meeting was a nullity merely because the notice convening it, and which was regularly signed by the secretary, purported to be sent on behalf of the guarantors instead of the committee. Mr. McGonigal told us of the slight difference in personnel, but the large majority of members of these two bodies were the same. Moreover, if there was any irregularity

(1) L.R. 4 Eq. 9 at p. 11.

it should have been raised at the time; and, as the point was not taken, it must be held to have been waived.

The next alleged irregularity is that it is said that only nine members were present at the meeting, whilst ten were necessary to constitute a quorum. On this point I am unable to accept the mere recollection of one or two members as against the signed minutes which state that twelve members were present.

Finally, it is said that the meeting of 17th December, 1926, was a special general meeting of the Society, and that the allotment of loan guarantee shares should have been made under rule 21 at a meeting of committee. I may say I doubt very much if it was intended by the rule to confer upon the committee an exclusive jurisdiction in respect of allotment which could not be controlled by the Society. I think on the analogy of *Huth* v. *Clarke* (1) that the committee were rather agents of the Society, to whom for purpose of convenience the duty was delegated; and this does not imply a parting with their powers by the Society. But, however this may be, under rule 17 the "issuing" of loan guarantee shares to members was expressly left in the hands of the Society, and this, according to the minutes, is what in terms was the business transacted at the meeting of 17th December, 1926.

On every ground, therefore, Mr. McGonigal's very able argument fails, and the appeal must be dismissed with costs.

Solicitors for the first group of appellants: *M. C. Feeny & Son.*

Solicitors for the second group of appellants: *Martin, King, French & Ingram.*

Solicitors for the respondent: *Caldwell & Robinson.*

J.D.C.

(1) 25 Q.B.D. 391.

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July 2. Nov. 6.

McPARLAND v. CONLON.

[IN THE COURT OF APPEAL.]

Local Registration of Title—Conclusiveness of the register—Sale of registered lands by Administrator—Subsequent discovery of Will—Transfer not registered—Sub-division—Northern Ireland Land Act, 1925 (15 *and* 16 *Geo.* 5, *c.* 34), *s.* 30 (1)—*Case stated.*

Letters of administration were granted to the brother of a man who was erroneously presumed to have died intestate. The administrator, as personal representative of the deceased, sold and conveyed to a purchaser a portion of the lands belonging to the deceased. Upon the subsequent discovery of a will, the plaintiff obtained a grant of probate.

On 2nd January, 1923, P. McG., who had obtained a grant of letters of administration, put up the lands for sale, and on 18th January, 1923, the defendant signed an agreement for purchase for the sum of £80. The agreement incorporated in the contract the conditions of sale, in No. 6 of which it was erroneously stated that the vendor was registered, pursuant to the Local Registration of Title (Ireland) Act, 1891, as owner. This condition further stated that the vendor was selling as beneficial owner, but that for further assurance to the purchaser he would join as personal representative of the former registered owner. The Land Commission refused to consent to the sub-division of the lands.

In a civil bill on the title brought by the administrator with the will annexed to recover possession of the portion of the lands sold, coming before the County Court Judge, he dismissed it with costs. The plaintiff appealed to the Judge of Assize, who stated a case for the consideration of the Court of Appeal. The Case Stated contained a statement that P. McG. (who had obtained a grant of letters of administration), on 30th January, 1923, executed a transfer of the lands and conveyed the same as personal representative.

It was contended, on behalf of the plaintiff, (a) that the transfer was made by P. McG., as personal representative, under the grant of adminstration intestate, and that, as it now appeared that the deceased had disposed of the property by will, no property passed under the transfer; (b) as the transfer was not registered no property passed; (c) as the Land Commission did not consent to the sub-division of the lands on the folio no property passed; and (d) that the folio was conclusive as to the title to the lands.

Held, by the Court of Appeal (Andrews and Best, L.J.J.)—

(a) that the grant of administration was not void *ab initio*, and that the purchaser had acquired a good title;

Hewson v. *Shelley* [1914], 2 Ch. 13, followed:

(b) that the provisions of section 30 (1) of the Northern Ireland Land Act, 1925, were not retrospective and had no application to the present case;

(c) that the folio was not conclusive as to the title of the registered owner.

CASE STATED by Brown, J., on appeal from a dismiss pronounced by the County Court Judge of Armagh in a Civil Bill in Ejectment on the Title.

The case stated set out:—

A civil bill in ejectment on the title was issued on the 12th day of December, 1928, by the plaintiff claiming possession of "All That part of the lands of deceased consisting of three fields and containing 4 acres 2 roods 0 perches statute measure or thereabouts in the townland of Ballykeel in the barony of Orior Upper and situate in the division and county aforesaid." The civil bill was heard before the County Court Judge of Armagh on the 7th day of January, 1929, and he dismissed the civil bill with costs.

The plaintiff appealed from this dismiss and the hearing of the appeal came before me as Judge of Assize on March 14th, 1929, at Armagh.

The following facts were admitted by Counsel for the plaintiff and defendant:—

1. That on the 14th day of December, 1915, Murty McGlade was registered as owner in fee simple of the lands comprised in Folio No. 12348, County Armagh, containing 15 acres 1 rood 0 perches, part of which are the lands set out in the civil bill.

2. That the said Murty McGlade died a bachelor without parent on the 6th day of February, 1920, leaving his brother Patrick McGlade his sole next-of-kin, having made his last will dated the 29th day of August, 1917, of which he appointed the said Patrick McGlade and Bridget McGlade (daughter of Patrick McGlade) executors, and whereby he devised lands comprised in the said Folio to Patrick McGlade for life and after his death to Bridget McGlade, and testator desired that Patrick McGlade or his daughter, Bridget McGlade, should not mortgage or sell any particular part of his dwelling-house or any particular part of the said lands during their lifetime.

3. That the said will was not propounded for probate but the said Patrick McGlade obtained a grant of letters of administration of the personal estate of the said Murty McGlade deceased on the 10th day of January, 1923.

4. That Patrick McGlade on the 2nd January, 1923, put up for sale the lands set forth in the civil bill, being a portion of the lands comprised in said Folio No. 12348.

5. That the defendant Peter Conlon signed a contract to purchase the said portion of the said lands and

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paid to Messrs. Fisher & Fisher, solicitors for Patrick McGlade, the sum of eighty pounds therefor. In the conditions of sale attached to and incorporated in the contract it is set forth in paragraph (6) of the said conditions that the vendor (Patrick McGlade) was registered pursuant to the Local Registration of Title (Ireland) Act, 1891, as owner of the property (being the lands set forth in the civil bill, that the property was purchased under the provisions of the Land Purchase Acts and was registered on the 14th day of December, 1915, in the name of Murtagh McGlade, that the vendor was selling as beneficial owner but for further assurance to the purchaser would also join as personal representative of the said Murtagh McGlade the former registered owner, that Murtagh McGlade died on the 6th day of February, 1920, intestate leaving Patrick McGlade the vendor his sole next-of-kin him surviving, that the purchaser should unreservedly admit that Murtagh McGlade was entitled to the lands absolutely at the time of his death, that Patrick McGlade was the sole next-of-kin, that the vendor would apply for an apportionment of the annuity and would redeem the annuity relating to the three fields so apportioned, and that the delay in getting his apportionment and redemption completed should not delay the closing of the purchase.

6. That on the 30th day of January, 1923, Patrick McGlade executed a transfer of the said lands set forth in the civil bill and conveyed the same as personal representative.

7. That the Land Commission refused to consent to the sub-division of the lands comprised in said Folio No. 12348, and said annuity has never been apportioned nor has it or any part thereof been redeemed.

8. That the said transfer executed by the said Patrick McGlade has not been registered and ever since its execution has remained in the possession of Messrs. Fisher & Fisher, who acted as Solicitors for the vendors in the said sale. No entry relating to same has been made on said Folio and Murtagh McGlade still remains the registered owner of all the lands comprised in the Folio.

9. That Patrick McGlade died on the 11th day of May, 1924, leaving his daughter Bridget M'Glade his sole next-of-kin.

10. That Bridget McGlade died on the 3rd day of May, 1928, having by her will dated the 19th day of July, 1926, appointed the plaintiff, James McParland, and John McParland her executors, and (inter alia) having also thereby made Ellen McParland, wife of the said James M'Parland (the plaintiff) her residuary legatee.

11. That letters of administration with the said will annexed of the said Murty McGlade were granted to the plaintiff, James McParland, on the 15th day of November, 1928.

Counsel on behalf of the plaintiff stated that the plaintiff was willing and undertook to repay to the defendant the said sum of eighty pounds so paid as aforesaid to Messrs. Fisher & Fisher as the purchase money of the said three fields.

The defendant called Mr. Alexander Fisher, Solicitor, as a witness.

Mr. Fisher stated that after sub-division had been refused by the Land Commission both Patrick McGlade and Bridget McGlade were most anxious to complete the sale to the purchaser.

That it was only after the death of Bridget McGlade that the will of Murtagh McGlade turned up.

That after the death of Patrick McGlade, Bridget McGlade gave him instructions for the sale of the remainder of the lands comprised in said Folio in order to redeem the Land Purchase Annuity.

That the eighty pounds paid by Peter Conlon, the defendant, were expended partly in the due administration of the estate of the said Patrick McGlade and partly given in cash to Bridget McGlade, and Mr. Fisher referred to his account book showing how the money had been expended.

I find the above facts as facts in the case.

The question for the decision of the Court is whether

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on the foregoing facts the defendant has a good equitable or legal defence to the plaintiff's claim for possession.

If the Court of Appeal decides that the defendant has such a good defence I affirm the dismiss of the County Court Judge with costs below and costs of appeal. If the Court of Appeal decides that the defendant has not such a good defence I reverse the dismiss appealed from with costs below and costs of appeal.

Davison K.C. and *Sheil* for the plaintiff:—

Section 54 (1) (a) of the Act of 1903 prohibits sub-division of these lands without the consent of the Land Commission.

There never was a transfer of the lands by Patrick McGlade. The document was never registered, and the whole transaction had been dropped for years. The instrument of transfer remained all the time in the office of the defendants' solicitors; there was therefore no delivery of the deed which remained an escrow. This was not a sale by an administrator, but was a sale by a beneficial owner as such. (They referred to the conditions of sale and to the transfer.) If that be so *Hewson* v. *Shelley* (1) is of no assistance to the defendant. The trend of the decisions in Ireland, including *Fitzpatrick* v. *McGlone* (2), and *Creed* v. *Creed* (3), is in any event in conflict with the decision in *Hewson* v. *Shelley* (1). These two Irish cases have been referred to with approval by the Supreme Court of the Irish Free State in *Dooley* v. *Dooley* (4). See the judgment of Fitzgibbon, J., at p. 207. *Pim* v. *Coyle* (5) is still good law, and the real decision in it is not affected by the observations of the Supreme Court of the Irish Free State in *Devoy* v. *Hanlon* (6). The transaction not having been completed, still remained an attempted sub-division of the lands at the date of the passing of the Northern Ireland Land Act, 1925, and section 30 of that Act operated on the transfer and made it entirely void.

(1) [1914] 2 Ch. 13.
(2) [1897] 2 I.R. 542.
(3) [1913] 1 I.R. 48.
(4) [1927] I.R. 190.
(5) [1907] 1 I.R. 330, 334.
(6) [1929] I.R. 246.

Murphy K.C. and *Johnson* for the defendant :—

The prohibition against sub-division imposed by section 54 of the Land Act of 1903 only applies as between the Land Commission and the proprietor of the holding, and in no way affects a sub-division between the transferor and the transferee. *In re Geoghegan* (1). Section 30 of the Northern Ireland Land Act, 1925, was not in operation at the time the transfer was executed, and section 30 is not retrospective, and has therefore no application to the present case. *In re Moses Stewart*, a Bankrupt (2). This was a sale by a personal representative as appears from the form of the transfer. The words beneficial owner in the transfer do not prevent the transfer from being a transfer by Patrick M'Glade in his capacity of administrator of Murty McGlade deceased. *Re the Local Registration of Title (Ireland) Act*, 1891, *and Earl Fitzwilliam* (3). An administrator whose letters of administration are subsequently revoked can nevertheless give a good title, *Hewson* v. *Shelley* (4). *Fitzpatrick* v. *McGlone* (5) was decided on a different point, as in that case probate of the will was revoked and letters of administration subsequently granted. Chief Baron Palles in that case did not state a proposition contrary to the subsequent decision in *Hewson* v. *Shelley* (6), but merely distinguished the cases, which were afterwards over-ruled by *Hewson* v. *Shelley* (6), from the case he was deciding. The judgment of the Supreme Court of the Irish Free State in *Dooley* v. *Dooley* (7) makes it quite clear that that court was careful to refrain from deciding this question of the validity of the acts of an administrator whose letters of administration were subsequently revoked. The decision in *Pim* v. *Coyle* (8) is not inconsistent with the defendant's contention, as it only decided that a judgment mortgagee who had registered his judgment in the Local Registration of Title Office, took priority to a prior unregistered transferee. In so far as the dicta in *Pim* v. *Coyle* (8) is inconsistent with the defendant's contention it is not good law,

(1) [1918] 1 I.R. 188.
(2) [1925] 2 I.R. 51.
(3) 41 I.L.T.R. 143.
(4) [1914] 2 Ch. 13.
(5) [1897] 2 I.R. 542.
(6) [1914] 2 Ch. 13.
(7) [1927] I.R. 190, 197.
(8) [1907] 1 I.R. 330, 334.

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for as was pointed out by Kennedy, C. J., in *Devoy* v. *Hanlon* (1), section 44 (2) of the Local Registration of Title (Ireland) Act, 1891, was not considered in *Pim* v. *Coyle* (2). It is quite clear from this sub-section that a registered owner may create a right in or over registered land, which will be good though not registered. Section 95 (1) of this Act defines "right" as including estate, interest, equity, and power.

(They also referred to *Tench* v. *Molyneux* (3).

Cur. adv. vult.

Andrews, L.J.

Nov. 6

ANDREWS, *L.J.*: This is a case stated by Brown, J., from the Spring Assizes for the county of Armagh. By his civil bill on the title the plaintiff, who is administrator with the will annexed of Murty McGlade, sought to recover possession of three fields, containing 4½ acres, situate in the townland of Ballykeel. The County Court Judge dismissed the civil bill, and from this dismiss the plaintiff appealed.

The lands in question are part of a farm of 15a. 1r. of which Murty McGlade was registered owner. When he died, a bachelor, on 6th February, 1920, he left his brother Patrick his sole next-of-kin. It was believed that he had left no will, and, accordingly, Patrick entered into possession of the lands as such next-of-kin. On 2nd January, 1923, he put up the portion of the lands comprised in the civil bill for sale, and on 18th January, 1923, the defendant signed an agreement for purchase thereof for the sum of £80 which was duly paid to Messrs. Fisher & Fisher, solicitors for the vendor. The agreement incorporated in the contract the conditions of sale, in No. 6 of which it was erroneously stated that the vendor (Patrick M'Glade) was registered pursuant to the Local Registration of Title (Ireland) Act, 1891, as owner. This condition further stated that the vendor was selling as beneficial owner, but that for further assurance to the

(1) [1929] I.R. 246. (2) [1907] 1 I.R. 330, 334.
(3) 48 I.L.T.R. 48.

purchaser he would join as personal representative of Murtagh McGlade, "the former registered owner." The vendor undertook that he would apply for an apportionment of the annuity and would redeem the portion relating to the three fields.

Letters of administration to the estate of Murty McGlade were issued to Patrick M'Glade on 10th January, 1923; and paragraph 6 of the case contains the statement which the learned Judge says was admitted by Counsel for both plaintiff and defendant "that on 30th January, 1923, the said Patrick McGlade executed a transfer of the said lands set forth in the civil bill and conveyed the same as personal representative." The defendant apparently thereupon entered into and has since remained in possession of the lands so transferred. The Land Commission, however, refused to consent to the sub-division of the lands and the annuity has never been apportioned, nor has any part of it been redeemed. The transfer was never registered, and it has remained since its execution in the possession of Messrs. Fisher & Fisher. The name of Murtagh McGlade, though he is long since deceased, still remains in the Folio as that of the registered owner of all the lands.

Patrick McGlade died intestate on 11th May, 1924, leaving his daughter Bridget his sole next-of-kin. The latter died on 3rd May, 1928, having made a will, dated 19th July, 1926, by which she appointed the plaintiff and one John McParland her executors.

It is only within the last year or two that a will of Murty McGlade, dated 29th August, 1917, has come to light. From whose custody it was obtained or by whom it was found does not clearly appear. It was duly proved, and letters of administration with the said will annexed were granted to the plaintiff, the acting executor of Bridget, on 15th November, 1928. By that will Murty McGlade bequeathed his dwelling house, farm, and other property to his said brother Patrick for his life, and after his death to his niece, the said Bridget McGlade, with a condition attached that neither Patrick nor Bridget should sell or mortgage any part of the property during their lifetime.

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Mr. Davison, for the plaintiff sought possession on the following grounds :—

(1) That the transfer of 30th January, 1923, was never a completed deed, but merely an escrow, and, accordingly, that the property did not pass under it.

(2) That, even if the transfer was completed, it was made by Patrick McGlade as beneficial owner, i.e., as sole next-of-kin of Murty McGlade, and not as his personal representative; that, as it now appeared that Murty McGlade had disposed of the property by will, Patrick had no estate or interest therein as such next-of-kin and merely a life interest under the will; and, accordingly, that the property did not pass.

(3) That, even if on the findings, Patrick McGlade must be taken to have conveyed as personal representative, yet he did so as one to whom a grant of letters of administration had been made on an assumed intestacy; and that the discovery and proof of the will by the plaintiff rendered such grant and any conveyance made under it absolutely void.

(4) That as the Land Commission refused their consent, the attempted sub-division is void under section 30 of the Northern Ireland Land Act, 1925.

(5) That the Folio is conclusive as to the title of the lands; and, accordingly, that the plaintiff is entitled to recover possession as administrator with the will annexed of Murty McGlade, the registered owner.

In my opinion the first two of the above arguments are not open to the plaintiff on the case as stated and agreed upon by the parties. As above mentioned the case finds—indeed it states that it was admitted "that on 30th January, 1923, the said Patrick McGlade executed a transfer . . . . and conveyed as personal representative." This is a finding of fact, and, possibly also, a finding of mixed law and fact, by which I hold we are bound. As "execution" includes the three elements of signing, sealing, and delivering, the argument that the transfer deed was not delivered, but that it was held merely

as an escrow, cannot be sustained. So also any legal doubt which might otherwise have existed as to the capacity in which Patrick M'Glade purported to convey cannot be considered by us. In view of the finding he must for the purposes of this case be regarded as having conveyed as personal representative.

Plaintiff's third submission is one of some legal difficulty. *In Fitzpatrick* v. *McGlone* (1), the Court of King's Bench, consisting of Palles, C. B., and Andrews, J., were called upon to consider the converse case to the present. Probate of an alleged will had been granted in common form to executors who paid a charitable legacy to the defendant. Subsequently probate was revoked, and letters of administration of the personal estate of the deceased as dying intestate were granted to the plaintiff. It was held that the plaintiff could not recover from the defendant the amount which the latter had expended in execution of the supposed trusts. The principle underlying the decision was that, as the deceased had in fact died intestate, the personal estate had vested in the Judge who had power to grant administration of it, and that the probate contained words which amounted to a grant of administration. The grant was merely voidable, not void, and, being within the jurisdiction of the Court, it passed the property. This was the only point which really arose for consideration; but the Court at the same time contrasted the case with one such as that which we have now to determine, namely, where a grant of administration is made in the first instance as on a supposed intestacy, and it subsequently transpires that the deceased has left a will. In such a case the Court intimated that, as the executor derived his entire authority, not from the probate, but from the will, the previous grant of administration was void *ab initio*. The personal estate vested in the executor at the moment of death, and, accordingly, did not pass to the Judge of the Court of Probate, who, consequently, could pass nothing by his grant. *Graysbrook* v. *Fox* (2), *Abram* v. *Cunningham* (3) and *Wooley* v. *Clark* (4) were cited as authorities in support

(1) [1897] 2 I.R. 543.
(2) 1 Plowd. 275.
(3) 2 Lev. 182.
(4) 5 B. & Ald. 744.

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of this view, which, however, as I have already indicated, was unnecessary for the decision.

This question, however, arose directly for determination by the English Court of Appeal in the subsequent case of *Hewson* v. *Shelley* (1). Letters of administration were granted to the widow of a man who was erroneously presumed to have died intestate. The administratrix sold a portion of his estate to a purchaser. When the will was discovered the executors obtained a recall of the letters of administration and a grant of probate to themselves. They sued to recover possession of the portion of the estate sold by the administratrix but failed, as the Court was of opinion that the grant of administration was not void *ab initio*, and that, accordingly, the purchaser had acquired a good title. The Court expressly disapproved of and over-ruled such cases as *Graysbrook* v. *Fox* (2) and *Abram* v. *Cunningham* (3), expressing the opinion that the person for the time being clothed by the Court of Probate with the character of legal personal representative is the legal personal representative and enjoys all the powers of a legal personal representative unless and until the grant of administration is revoked or has determined. If this were not so, it was felt that no person could safely deal with or accept a title from an administrator, for it is impossible to prove that there may not be a will. The true view in the opinion of all the members of the Court was that the property passed under the grant of administration, and that the authority of the administrator was not a void but a determinable one.

It is unfortunate that *Fitzpatrick* v. *McGlone* (4) was not cited to the Court in *Hewson* v. *Shelley* (5). There is no reason to suppose, however, that if it had been brought to the notice of the Court it would have affected their decision in any way; for, as above mentioned, they expressly over-ruled the cases upon which the Irish Court based their judgment in holding that a grant of letters of administration as on an intestacy was void *ab initio* if there was in fact a will in existence of which probate was

(1) [1914] 2 Ch. 13
(2) 1 Plowd. 275.
(3) 2 Lev. 182.
(4) [1897] 2 I.R. 542.
(5) [1914] 2 Ch. 13.

subsequently granted. There can be no doubt as to the convenience and advantage of the principle underlying the decision in *Hewson* v. *Shelley* (1) and I accept its authority. A purchaser for value dealing in good faith with a person who has been clothed by the Court of Probate with the necessary authority to sell the lands of a deceased is entitled to assume that he is acquiring a good title from such person so long as such authority remains unrevoked. In my opinion, therefore, the plaintiff also fails in his third submission.

The plaintiff in the next place relies upon the provisions of Section 30 (1) of the Northern Ireland Land Act, 1925, as rendering the attempted sub-division of the holding effected by the assignment void. In my opinion the complete answer to that contention is that by its express language—"any attempted sub-division . . . . *shall be* void"—the section applies only to attempted sub-divisions made subsequent to the passing of the Act or its coming into operation, and that it is in no sense retrospective in operation. Accordingly, it has in my opinion no application to the present case. I may add that in *Nugent* v. *Gormley; O'Doherty, Appellant* (2), it was rightly assumed by all parties and by this Court that similar language in section 30 (2) of the Northern Ireland Land Act, 1925, which removed restrictions on mortgaging, had no retrospective operation. See also a decision to the like effect by the Supreme Court of The Irish Free State *In re Stewart, a bankrupt* (3), upon the corresponding section (78) of The Irish Free State Land Act, 1923.

The last point submitted by the plaintiff, namely, the conclusiveness of the Register as to the title of the registered owner, Murty McGlade, is in my opinion equally unsustainable. *In Miscampbell* v. *McAlister* (4) we recently decided in this Court that the register was not conclusive in regard to easements, and I referred with approval to the case of *Devoy* v. *Hanlon* (5), which had just been reported, and which had, accordingly, not been cited to us during the arguments. "The Court," I said,

(1) [1914] 2 Ch. 13.
(2) [1927] N.I. 198.
(3) [1925] 2 I.R. 51.
(4) [1930] N.I. 74.
(5) [1929] I.R. 246.

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"was unanimously of opinion that the Local Registration of Title (Ireland) Act, 1891, provides for the recognition of rights, including estates, which do not appear on the register, and held that such rights are valid against the registered owner creating them, against a voluntary transferee from the registered owner, and against everyone claiming through a voluntary transferee where the person so claiming has not given valuable consideration."

In my opinion this authority conclusively rules the present case, as the plaintiff is not an assignee for value from the registered owner but merely his personal representative, who can have no higher rights than the registered owner himself would have had, if, after having executed an unregistered transfer to the defendant, he had subsequently instituted proceedings against him for the recovery of possession.

In my opinion, therefore, the plaintiff fails on all grounds. The dismiss should be affirmed, and the appeal dismissed. We allow the defendant fifteen guineas costs of this Case Stated.

Best, L.J.

BEST, L.J.: From the case stated it appears that Murtagh McGlade was on the 14th day of December, 1915, registered as owner in fee simple of the lands comprised in Folio No. 12348, County Armagh, containing fifteen acres or thereabouts, part of which are the lands set out in the civil bill the subject matter of the appeal before Mr. Justice Brown. Murtagh McGlade died on the 6th day of February, 1920, leaving a brother, Patrick McGlade, as his sole next-of-kin. By his will dated the 29th day of August, 1917, and duly executed, Murtagh McGlade appointed the said Patrick McGlade and Bridget McGlade, daughter of Patrick, his executor and executrix and devised the lands comprised in the said Folio to Patrick McGlade for life, and after the death of Patrick to Bridget McGlade absolutely, and testator expressed the desire that neither Patrick nor Bridget should mortgage or sell his dwelling-house or any particular part of the lands during his or her respective lifetime.

On the assumption, which later proved to be erroneous, that Murtagh McGlade had died intestate, a grant of letters of administration of his personal estate was made to Patrick McGlade on the 10th day of January, 1923.

The lands mentioned in the civil bill were sold to the defendant, James Conlon, who, on the 18th day of January, 1923, signed a memorandum acknowledging himself to be the purchaser thereof from Patrick McGlade at the sum of eighty pounds and binding himself to complete the purchase agreeably to the particulars and conditions of sale under which same were sold. The 6th condition stated that the vendor was registered pursuant to the Local Registration of Title (Ireland) Act, 1891, as owner of the property (being, inter alia, the lands set forth in the said civil bill), and that the property was purchased under the provisions of the Land Purchase Acts and was registered on the 14th day of December, 1915, in the name of Murtagh McGlade, and that the vendor was selling as beneficial owner but for further assurance to the purchaser, would also join as personal representative of Murtagh McGlade, the former registered owner.

From an inspection of Folio No. 12348, County Armagh, relating to the lands, it appears that Patrick McGlade was not in fact registered as owner thereof.

On the 30th day of January, 1923, Patrick McGlade, the personal representative of the above named registered owner, Murtagh McGlade, in consideration of the sum of eighty pounds paid to him by Peter Conlon, called the transferee, as beneficial owner transferred to the transferee that part of the lands comprised in the said Folio (being the lands set out in the civil bill) to hold unto and to use of the transferee in fee simple.

The Land Commission refused to consent to the subdivision of the lands comprised in the Folio and the annuity payable in respect thereof has not been apportioned nor has it nor any part thereof been redeemed.

The transfer executed by Patrick McGlade in favour of Peter Conlon, the defendant in the civil bill, has not been registered, and no entry relating to same has been made on the Folio, and the said Murtagh McGlade still appears as registered owner of all the lands comprised therein.

Patrick McGlade died on the 11th day of May, 1924, leaving his daughter, Bridget McGlade, his sole next-of-

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kin. She made her will dated the 19th day of July, 1926, and thereby appointed James McParland, plaintiff herein, and John McParland her executors and made Ellen McParland, wife of the said James McParland, her residuary legatee.

Bridget McGlade died on the 3rd day of May, 1928, and on the 5th day of July, 1928, probate of her will was granted to the plaintiff, James McParland, the right of the other executor John McParland being reserved.

Letters of administration with will annexed of the said Murtagh McGlade were granted to the plaintiff, James McParland, on the 15th day of November, 1928. Counsel on behalf of the plaintiff stated on the hearing of the civil bill appeal that the plaintiff was willing and undertook to pay to the defendant the sum of eighty pounds paid as the purchase money of the lands set out in the civil bill in case a decree in ejectment was granted by the Court.

The question for decision is whether on the facts set out in the case the defendant has a good, equitable or legal defence to the plaintiff's claim for possession of the lands set out in the civil bill.

The first point made by Mr. Davison for the plaintiff is that the transfer of 30th January, 1923, was never completed as the consent of the Land Commission to the subdivision of the holding was not obtained and registration of the defendant as owner of the lands purchased was not carried out, and that therefore the deed is no more than an escrow. In my opinion this point fails as the deed purports to be signed, sealed and delivered by Patrick McGlade and it was undoubtedly acted upon both by him and by the defendant.

Mr. Davison next argues that even if the transfer were completed, it was made by Patrick McGlade as sole next-of-kin of Murtagh McGlade and not as his personal representative. If the point were open to us there might be something to be said for this contention, since in the transfer, though Patrick McGlade is described as the personal representative of Murtagh McGlade, he transfers as beneficial owner, but we are bound by the facts found, and in paragraph 6 of the case it is stated that one of the facts admitted is that Patrick McGlade conveyed as personal representative,

Mr. Davison's next point is that even if on the findings Patrick McGlade had transferred as personal representative of Murtagh McGlade, yet in the events that have happened the grant to Patrick of letters of administration to Murtagh is void *ab initio*.

The effect of a grant of letters of administration where a man is erroneously presumed to have died intestate is discussed by the Court of Appeal in England in *Hewson* v. *Shelley* (1). In that case George Francis Hewson was supposed to have died intestate and letters of administration were granted to his widow, who, as personal representative of the deceased, by virtue of the Land Transfer Act, 1897, sold and conveyed to a purchaser a portion of the deceased's real estate. Upon the subsequent discovery of a will the executors therein named obtained a recall of the letters of administration and a grant of probate to themselves. The executors brought an action to recover possession of the real estate sold by the administratrix and it was held, reversing the decision of Astbury, J., that the grant of administration was not void *ab initio* and that the purchaser had acquired a good title. The cases relied on for the executors—*Graysbrook* v. *Fox* (2), *Abram* v. *Cunningham* (3) and *Ellis* v. *Ellis* (4)—as showing that the grant of letters of administration was void *ab initio* were over-ruled by the Court.

Fitzpatrick v. *McGlone* (5) to which we were referred, was not cited in *Hewson* v. *Shelley* (6). That was a case in which probate of an alleged will was granted in common form to the executors named therein and they paid a charitable bequest to the defendant, who, bona fide and without any notice of the invalidity of the alleged will, applied portion thereof in accordance with the trusts of the bequest. Probate was afterwards revoked but not by consent and letters of administration of the personal estate of the deceased, as dying intestate, were granted to the plaintiff, and it was held by the Court, consisting of Palles, C. B., and Andrews, J., that the plaintiff could

(1) [1914] 2 Ch. 13.
(2) 1 Plowd. 275.
(3) 2 Lev. 182.
(4) [1905] 1 Ch. 613.
(5) [1897] 2 I.R. 542.
(6) [1914] 2 Ch. 13.

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not recover from the defendant the amount which the latter expended in execution of the supposed trusts. *Graysbrook* v. *Fox* (1) and *Abram* v. *Cunningham* (2) were discussed at length by the Chief Baron and were treated as having been rightly decided but the decision of the Court was not grounded on their authority, and I can see nothing in that decision inconsistent with the conclusion arrived at in *Hewson* v. *Shelley* (3). I cannot, therefore, accepting as I do the decision of the Court of appeal in *Hewson* v. *Shelley* (3), agree with Mr. Davison that the grant of letters of administration to Patrick McGlade was void *ab initio*, or that the transfer by him to the defendant was in consequence invalidated.

Mr. Davison further relied on section 30, sub-section (1), of the Northern Ireland Land Act, 1925, which provides that any attempted sub-division or letting of a holding in contravention of section 30 of the Land Law (Ireland) Act, 1881, or section 54 of the Act of 1903, shall be void, but the short answer to this argument is that the section is not retrospective.

Lastly he relied on the conclusiveness of the register as to the title of the registered owner, Murtagh McGlade, now represented by the plaintiff.

The question of the conclusiveness of the register was considered by this Court in *Miscampbell* v. *McAlister* (4) where we held that it is not conclusive in regard to easements. My colleague, Lord Justice Andrews, in giving judgment in that case, referred with approval to the case of *Devoy* v. *Hanlon* (5), which had been reported subsequent to the arguments in Miscampbell's case and before our judgment in it was delivered. In *Devoy* v. *Hanlon* (5) it was held that the Local Registration of Title (Ireland) Act, 1891, provides for the recognition of rights including estates which do not appear on the register and that such rights are valid against the registered owner creating them, against a voluntary transferee from the registered owner, and against everyone claiming through a volun-

(1) 1 Plowd. 275.
(2) 2 Lev. 182.
(3) [1914] 2 Ch. 13.
(4) [1930] N.I. 74.
(5) [1919] 1 I.R. 246.

tary transferor, where the person so claiming has not given valuable consideration.

Here the plaintiff is merely the personal representative of the registered owner, not as assignee from him for value, and he can have no higher rights than that registered owner would have had if he had executed an unregistered transfer to the defendant and had subsequently sought to recover possession of the lands transferred.

I agree with the result arrived at in the judgment just delivered.

Solicitors for the plaintiff : *Corr & O'Connor.*
Solicitors for the defendant : *Fisher & Fisher.*

J. McC.

K.B.D.
(Matrimonial)
1930.

Feb. 21, 28.

TEES v. TEES (1).

Practice—*Alimony pendente lite*—*Arrears of a "debt" within the meaning of section 6 of the Debtors (Ireland) Act*, 1872 (*35 and 36 Vict., c. 57*)—*One committal order for default in payment of several instalments.*

By order dated 13th December, 1929, the respondent was ordered to pay to the petitioner, alimony *pendente lite*, payments to be made weekly. The petitioner brought a summons for an order that the defendant should be committed to prison for failing to pay such weekly instalments.

Held that payment of alimony *pendente lite* can be enforced by imprisonment under section 6 of the Debtors (Ireland) Act, 1872 and that such imprisonment can be awarded, in one order, in respect of default in payment of more than one instalment.

SUMMONS brought by the petitioner in a matrimonial suit, for an order that the respondent should be committed to prison for contempt of Court in failing to pay certain instalments due on an order for repayment of alimony *pendente lite*.

The respondent had, by order dated the 13th December, 1929, been ordered to pay alimony *pendente lite* at the rate of £1 10s 0d per week, commencing from the 29th September, 1929. The application for committal was made in respect of the non-payment of twelve such instalments.

Curran for the petitioner :—

An instalment payable under an order for payment of alimony *pendente lite* is a debt within the meaning of section 6 of the Debtors (Ireland) Act, 1872. In *Linton* v. *Linton* (2) Bowen, L.J., stated that he did not consider that it is too wide a construction to say that arrears of alimony are a debt within the meaning of section 5 of the Debtors Act, 1869. This section is substantially similar to the section under which the present application is made. In *Daly* v. *Daly* (3) payment of arrears of alimony was enforced by imprisonment and the order was made in respect of the non-payment of several instalments.

(1) In the King's Bench Division (Matrimonial) before Moore, L.C.J.
(2) 15 Q.B.D. 239 at p 246. (3) 17 L R.I. 372.

Warnock for the respondent:—

The object of the Debtors (Ireland) Act, 1872, was to abolish imprisonment for debt except in certain cases specified in section 5. The present case does not come within any of these exceptions. The arrears in question do not constitute a "debt" within the meaning of section 6. In *Bailey* v. *Bailey* (1) it was held that such arrears were not a debt in respect of which an order for final judgment could be made and in *De Lossy* v. *De Lossy* (2) an application to attach a husband for failure to pay arrears of maintenance was refused. It has recently been held in England that, although non-compliance with orders of the Divorce Division is still a contempt of Court, since the Debtors Act, 1869, such orders cannot be enforced by attachment. *Leavis* v. *Leavis* (3).

Bowen, L.J., in his judgment in *Linton* v. *Linton* (4) which is relied upon in support of the present application is referring to section 5 of the English Statute. The words "made or recovered in respect of a debt contracted after the passing of this Act" which appear in section 6 of the Debtors (Ireland) Act, 1872, are not found in the corresponding section of the English Act.

The application in *Daly* v. *Daly* (5) was made *ex parte* and accordingly this decision should not be followed without due consideration.

[He also referred to *Ivimey* v. *Ivimey* (6) and *Robins* v. *Robins* (7).]

Curran (in reply):—

It is true that the Debtors (Ireland) Act, 1872, abolishes attachment for debt except in certain cases but section 6 provides a new remedy, namely committal, which is appropriate to the present case.

The contention that the additional words in section 6 of the Irish Statute modify the effect of this section, as compared with the corresponding section of the English Act of 1869, cannot be sustained in view of the definition of a "debt" in section 4 of the Debtors (Ireland) Act, 1872.

Cur. adv. vult.

(1) 13 Q.B.D. 855.
(2) 15 P.D. 155.
(3) [1921] P. 299.
(4) 15 Q.B.D. 236 at p 246.
(5) 17 L.R.Ir. 372.
(6) [1908] 2 K.B. 260.
(7) [1907] 2 K.B. 13.

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MOORE, L.C.J.: By order of December 13th, 1929, made in this suit, it was ordered "that the respondent do pay alimony *pendente lite* at the rate of one pound ten shillings per week commencing from September 29th, 1929, said payments to be made weekly." The present application is for an order that the respondent be committed to prison for contempt of Court in not paying to the petitioner twelve successive weekly instalments, the first being in respect of the week 9th-16th November, 1929.

This case has been very well argued by Counsel and it is unnecessary to recapitulate the respective contentions since it is finally admitted by both sides that the only questions remaining for decision are:—

(a) Whether section 6 of the Debtors (Ireland) Act, 1872, applies to enforce this liability; and

(b) If so, whether imprisonment can be awarded by the same order in respect of default in more than one instalment.

Is then an instalment under the order of 13th December, 1929, "a debt" within the meaning of the Statute, once it becomes due?

Mr. Curran relies on the judgment of Judge Warren in *Daly* v. *Daly* (1). This is an authority in his favour on each of the questions that I have indicated. Mr. Warnock, however, seeks to destroy the value of this authority by pointing out that it was made *ex parte*. That is no doubt true, but it must be remembered that the practice as regards *ex parte* applications in the Probate and Matrimonial Division Court was to give the Judge notice by lodging a motion paper prior to the application so that the proposed application could be considered in advance, as we know Judge Warren always did. Further I can not find that the practice as laid down here has ever been departed from. Mr. Curran also relies on *Linton* v. *Linton* (2) when the judgment of Cave, J., was affirmed by a strong Court of Appeal, Brett, M.R., Baggalley and Bowen, L.J.J. The Court held that arrears under such an order as the present were not capable of valuation and proof in the husband's bankruptcy, but were enforceable

(1) 7 L.R.Ir. 372. (2) 15 Q.B.D. 239.

under section 5 of the Debtors Act, 1869, which for all material purposes is the same as our section 6 of the Act of 1872.

Following Mr. Warnock's example, I have consulted the several cases in the Empire Digest (Title Husband and Wife) where *Linton* v. *Linton* (1) is summarised, but I can not find that it is anywhere dissented from, on this latter point. I may say that in the same Digest, Vol. 5 at p. 1,022, Sub-title Bankruptcy, several cases are cited showing other liabilities under orders made in the Matrimonial Division are not to be considered as "debts" within the Act. However, *Watkins* v. *Watkins* (2), a decision of the Court of Appeal, is not exactly in point, but Lindley, L.J., refers to *Linton* v. *Linton* (1) as an unquestioned authority for its own proposition.

In *Victor* v. *Victor* (3), Cozens-Hardy, M.R., approved of *Linton* v. *Linton* (1) as an authority on the enforcement of law of alimony, as distinguished from the law relating to covenants in a separation deed; but it is right to say that these decisions only arise in respect of the first part of the case in *Linton* v. *Linton* (1) relating to proof in bankruptcy, while the second part (the applicability of the Debtors Act to instalments of alimony) stands everywhere unquestioned. In *Tangye* v. *Tangye* (4), Sir Samuel Evans expressly quotes with approval the decision of Bowen, L.J., in *Linton* v. *Linton* (1) "that arrears of alimony are within the meaning of section 5 of the Debtors Act 1869." I do not think it is necessary for me to go any further to establish the proposition that *Linton* v. *Linton* (1) is an unquestioned authority.

I have given every attention to the contention of Mr. Warnock that the words in section 6 of our Irish Act of 1872 additional to those in the 5th Section of the English Act of 1869 makes a distinction to be noted between the two Statutes. These words are added at the end of our section and are as follows: "(Debt) made or recovered after the passing of this Act in respect of a debt contracted after the passing of this Act." In my opinion these words create no real difference between the two Statutes; they

(1) 15 Q.B.D. 239.
(2) [1896] P. 222.
(3) [1912] 1 K.B. 247.
(4) [1914] P. 201 at p 207.

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simply leave the same question to be decided—Are these arrears of alimony a debt within the meaning of the section?

I therefore propose to follow the Irish decision in *Daly* v. *Daly* (1), as well as the several English authorities to which I have referred, and I rule accordingly that this application is properly made under section 6 of the Debtors (Ireland) Act, 1872.

The remaining question is whether or not the committal order should be made in respect of more than one instalment. In *Langford* v. *Laracy* (2), Andrews, J., refused to make an order in respect of six instalments of a common law debt, holding as reported that each default was a separate contempt. This case, though not mentioned in terms in the judgment of Fitzgibbon, L.J., in *McTaggart* v. *Howard* (3), is practically adopted by him in a passage in his judgment at the top of p. 560; it would therefore appear to be the recognised practice in the King's Bench Division only to commit in respect of a single instalment of a common law debt.

I think, however, that there is a distinction between arrears of alimony and such a debt. In *Daly* v. *Daly* (1) Judge Warren made a single order in respect of several instalments; in the Matrimonial Division, as appears from the judgment in *Keys* v. *Keys* (4), arrears up to a year of alimony were always allowed.

Mr. Curran says there is no question of means in the circumstances of the present case, and I therefore will make the order of committal in the terms prayed for. The order, however, will be stayed for seven days after service to give the respondent an opportunity for compliance. The respondent must, of course, pay the petitioner's costs of this summons.

Solicitor for the petitioner: *William L. Skelton.*
Solicitors for the respondent: *Wheeler & McCutcheon.*

J.D.C.

(1) 17 L.R.Ir. 372.
(2) 18 I.L.T.R. 39.
(3) [1903] 2 I.R. 557.
(4) [1919] 2 I.R. 160.

[IN THE HOUSE OF LORDS.]

H.L. 1930.

May 23
June 23.

WOODS v. DAVISON (1).

Negligence—Contributory negligence—Findings of Jury—Cause of accident —Absence of Light.

The plaintiff sustained injuries as the result of a collision which occurred between his motor bicycle and the defendant's motor car. The plaintiff alleged that he was riding his bicycle round a left-hand bend, and the defendant's car, which was coming round the bend in the opposite direction, and on the wrong side of the road, collided with his machine. The defendant contended that his car was on its proper side of the road, and that it was by reason of the fact that the plaintiff was on the wrong side of the road that the accident took place.

At the trial of the action the jury found that the plaintiff was on his proper side of the road when the collision happened; that the defendant was guilty of negligence and that the plaintiff was guilty of contributory negligence. On being sent back to consider the questions further, the jury found that the defendant's negligence caused the accident, and they assessed a sum for damages. In answer to a supplemental question the jury found that the plaintiff's contributory negligence consisted in not keeping a proper look-out and having no light on his machine.

On the answers of the jury the Trial Judge abstained from giving judgment for either party, and left the parties to move for judgment. Both the plaintiff and the defendant applied to the Court of Appeal for judgment, the plaintiff asking alternatively for a new trial. The Court of Appeal (Best, L.J., dissenting) refused the plaintiff's motion and entered judgment for the defendant.

Held, by the House of Lords (reversing the judgment of the Court of Appeal and upholding the dissenting judgment of Best, L.J.), that on the findings of the jury the plaintiff was entitled to judgment.

APPEAL (*in formâ pauperis*) from an order of the Court of Appeal in Northern Ireland, dated the 12th day of February, 1929, wherein the Court refused the plaintiff's motion for judgment on the findings of the jury and entered judgment for the defendant with costs of the action and of the appeal.

[The proceedings in the Court of Appeal are reported at page 57 *ante* (2).]

(1) In the House of Lords. Present: Viscount Hailsham, Lord Buckmaster, Viscount Dunedin, Lord Warrington of Clyffe and Lord Thankerton.

(2) 1930 N.I. 57.

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VISCOUNT HAILSHAM.

J. M. Whitaker K.C. and *Chambers* for the appellant.

Murphy K.C. and *Sheil* for the respondent.

The House took time for consideration.

June, 23.

VISCOUNT HAILSHAM (1): My Lords, the dispute in this case arises out of an unfortunate collision which took place on the 12th August, 1925, between the appellant's motor cycle and the respondent's motor car on the road between Moy and Portadown. On the evening of that day the appellant on his cycle was proceeding in the direction of Portadown; at a point about three miles before he reached that town he was coming round a left-hand bend in the road when he collided with the respondent's motor car proceeding in the opposite direction, and sustained serious injuries.

The action was tried before the Lord Chief Justice of Northern Ireland and a special jury. At the trial one of the principal matters in controversy was as to the place where the accident happened. The road is a wide one, something over 19 feet in width; the plaintiff alleged that the accident happened as he was coming round the corner on his proper side of the road, while the defendant's witnesses allege that the defendant's car was on its proper side of the road and the plaintiff came across on to his wrong side and so produced the collision.

In addition to a denial of any negligence on the part of his driver, the defendant alleged that the plaintiff had been guilty of contributory negligence. The Lord Chief Justice left to the jury the following questions:—(1) Was the plaintiff on his proper side of the road when the collision happened? (2) Was the defendant guilty of negligence? (3) Did such negligence cause the accident? (4) Was the plaintiff guilty of contributory negligence? (5) Damages, if any?

No objection was taken by either side to the learned Lord Chief Justice's summing up or to the questions so framed. The jury returned into Court and answered the first,

(1) The speeches in the House of Lords are printed from the shorthand notes of Messrs. W. B. Gurney & Sons.

second and fourth questions in the affirmative, but returned no answers to questions 3 and 5. The learned Lord Chief Justice directed the jury to retire again and to answer these two questions and thereupon they answered the third question in the affirmative and assessed the damages, if any, at £400.

The Lord Chief Justice then asked the jury a supplemental question: In what respect was the plaintiff guilty of contributory negligence? To which the jury replied: In not keeping a proper look out and having no light on his machine. On these findings, the Lord Chief Justice declined to enter judgment for either party and each party moved the Court of Appeal for judgment. The Court of Appeal, by a majority, ordered judgment to be entered for the defendant and it is from that decision that this Appeal is brought.

In my opinion it is plain that if the answer to the fourth question stands the judgment is correct. It is admitted that the answer was given after the jury had been correctly directed upon the law as to contributory negligence. It follows, therefore, that by their answer the jury have said that the plaintiff was negligent in not keeping a proper look-out and in having no light on his machine and that his negligence in these respects contributed to the accident. If there was evidence on which the jury could so find, this amounts to a verdict for the defendant and, indeed, the jury themselves seem so to have regarded it when they left the third and fifth questions unanswered.

The question for your Lordships to determine is whether there was any evidence on which the jury could reach that conclusion. Plainly, there was ample evidence to justify a finding that the plaintiff was negligent in both respects. It was admitted that the car had on all its lights, including electric head lights, and yet the plaintiff said that he never saw the lights of the car. The plaintiff admits that he had no light on his motor cycle, and there was evidence which the jury were entitled to accept that the accident happened a considerable time after the legal hour for lighting up. It only remains, therefore, to be considered whether there was evidence on which the jury could find that either of these acts of negligence contributed to the accident.

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So far as the failure to keep a proper look-out is concerned, I am satisfied that there was no such evidence. Although a proper look-out would have warned the plaintiff of the approach of the car, there was no evidence that it would have warned him of its position on the road; and it is common ground that when the car itself was visible so that its position could be appreciated, the collision happened practically instantaneously and it was too late for the plaintiff to do anything.

I have much more difficulty with regard to the absence of lights on the motor cycle. It is obvious from the map and from the evidence as to the nature of the road that, if the plaintiff had had lights, his approach must have been visible to the defendant's driver some appreciable time before the accident happened; and it seems to me very likely that the jury took the view that if these lights had been visible and if warning had been thereby given to the driver, he would not have attempted to cut the corner, or if he had already begun so to do, he would have had time to deflect his car sufficiently to avoid the collision, and therefore that the absence of the light on the motor cycle was a substantial factor in bringing about the collision. If I were at liberty to speculate, I am not sure that I should not have reached the same conclusion as the jury. But the difficulty is to find evidence on which to found that speculation. The defendant's case was that his driver never was on the wrong side of the road and, therefore, he could not say that the driver was induced into going or staying on the wrong side by any negligence of the plaintiff. The driver himself gave no evidence as to when he first became aware that the motor cycle was approaching. His mother is the only witness called for the defendant to give evidence upon this point, and she said that she heard the approach of the cycle and that the driver then drew into his near side, evidence which, if true, would indicate that the driver also had heard the approaching cycle and that he had heard it in time to turn aside. The jury must have disbelieved the mother's story; but there is an entire absence of any evidence on behalf of the defendant that the absence of light in anyway affected the driver's mind or had anything to do with the collision. The onus was upon the defendant to prove not only the fact of the

plaintiff's negligence, but also that it had some causal connection with the accident; and on the evidence before us I am not satisfied that he has adduced any legal proof of the latter point. On this ground I have reluctantly reached the conclusion that the appeal succeeds and that judgment must be entered for the plaintiff and I move your Lordships accordingly.

VISCOUNT DUNEDIN.

VISCOUNT DUNEDIN (read by LORD THANKERTON): My Lords, the verdict of the jury in answer to the special questions can be read as self-contradictory. The learned Judges of the Court of Appeal, by a majority, have read it as a verdict for the defendant. But there are two things clear: one is that the defendant was guilty of negligence, and the other is that a verdict in favour of the defendant can only be based on contributory negligence of the plaintiff. The question, therefore, is whether there is evidence on which a jury was entitled to hold that there was contributory negligence. In what that negligence consisted is specified in the answers of the jury to the supplementary question—"not keeping a proper look-out and having no light on his machine." I am of opinion that on the evidence it is impossible to say that either of these negligent acts contributed to the accident.

I take first, not keeping a proper look-out. The accident happened at the very apex of a corner, and it was proved that there were high hedges which prevented anyone seeing across the corner. So far, therefore, as avoiding the motor car which arrived at the apex well on its wrong side of the road, and cutting the corner, the plaintiff could not have avoided the accident. But it is said that he might have seen by the gleam of the motor car light along the road that something was coming. That is true, but what more could he have done than he did do? He hugged his own side of the road, being, as he said, within two feet of the ditch. That was exactly the proper thing to do if he thought something was coming round the corner.

Then comes the point that he ought to have had a light. Now, as regards the presence of a light, so far as he himself was concerned its absence would make no difference. If he had had a light, for the reasons given as to look-out he could not have escaped the accident. But then, it is

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said that if he had had a light it would have shown past the corner and the motorist, seeing that something was coming round, would have kept to his own side. There was no evidence as to this, and there could not be, for the defendant stoutly maintained, though untruthfully, as the jury have found, that he was on the right side of the road all along, and that the collision was caused by the plaintiff coming over to his wrong side. But further, this neglect does not seem to me to be a neglect contributing to the accident. The real cause of the accident was only that the defendant was on the wrong side of the road.

Now, if the plaintiff had done something which induced the defendant to go there, that would be something which contributed to the real cause of the accident, but he did nothing of the sort. What the defendant wishes to say is—"If you had had a lamp, I would not have been negligent." I have not found any case where the negligence of A did not lead B to commit an act of negligence, but simply raised the argument that if it had not been committed by A, B would have had a discouragement to commit his negligent act, in which it was found that the negligence of A was contributory to the bad result brought about by the negligence of B. The contrary to such an idea is expressed by a dictum in the Irish case of *Doyle* v. *Kinahan* (1), where it was said that by a plea of contributory negligence the defendant implies that he could not have avoided the accident. There was nothing here to prevent the defendant keeping to his own side of the road. I am therefore of opinion, putting it in ordinary language, that the sole cause of the accident in this case was the defendant's conduct in cutting the corner, careless of what might arrive on the other side, and that neither the fact that the plaintiff was not looking ahead, nor that his lamp was unlit, had anything to do with the collision that occurred. The result is that the appeal should be allowed, and judgment should be pronounced in favour of the plaintiff for the sum provisionally found by the jury.

LORD BUCKMASTER

LORD BUCKMASTER (read by LORD MACMILLAN): My Lords, it is impossible to read the evidence in this case without realising that the main issue round which the

(1) 17 W.R. 679.

controversy centred was as to which of the two parties was on his wrong side of the road at the moment of the accident, and this question was definitely decided by the jury against the defendant.

That this act of negligence was the origin of the accident is plain, but the defendant alleged in his pleading that the plaintiff had himself been guilty of negligence which contributed to the result.

The jury found this issue in the affirmative and by a subsequent rider declared that by their finding they meant that the plaintiff did not keep a proper look-out and, although lighting-up time was past, carried no light on his machine.

The question in this appeal is whether these two facts are shown by the evidence or demonstrate by their own character that they contributed to the accident.

The negligence so found is certainly of the gravest kind —to ride a motor bicycle at night without a light and without carefully looking ahead is so serious a matter that, had a foot passenger been thereby injured, criminal proceedings might well have been the sequel.

None the less, negligence, however gross in itself, must be connected with the accident in order to support a defence to an action in which the negligence of the other party is plainly proved. In the present case I have difficulty in seeing that such a connection is established.

Not keeping a look-out may be disregarded. Had the most vigilant watch been kept the plaintiff would, owing to the configuration of the road, have seen nothing but the light of an approaching car, and he would have been fully justified in keeping on his own proper course in the belief that the other car, which he could not see, was also on its right side of the road.

Such negligence, therefore, in no way contributed to the collision. The absence of the light is a more critical matter, but it lies upon the defendant to prove that this was a contributory cause. Upon this he offered no evidence. Nothing was said as to the distance along the road where the light might have been seen, it is not even said that the defendant was watching to see if such a light was visible, there was no evidence as to whether the night was clear or misty, moonlit or dark—the case is left with the mere fact

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that there was no light on a vehicle hidden behind the curve of a bending road and a conjecture as to what would be the result. I cannot think that this discharges the burden of proof which the defendant was bound to satisfy.

Further, the defendant's mother said she heard the cycle. Whether the defendant heard it or not we do not know. The case as left by the witnesses makes it just as probable that the defendant was not on his guard as that he was properly vigilant, and in such circumstances I do not think there was material on which the jury could connect the plaintiff's negligence with the accident.

The explanation is no doubt this, that the plea of contributory negligence defeated the real defence, for if the defendant had been, as was said, close to the verge on his proper side of the road, the accident could only have occurred by the plaintiff's own negligence in being on his wrong side, and the defendant did not direct his evidence to what the position might be if the fact were as the jury found that the plaintiff was well over on his proper side, and he (the defendant) on the wrong.

It is for these reasons that I think the appeal must succeed and I am glad to think that this conclusion appears to be in agreement with the opinion of the learned Judge who tried the case.

LORD WARRINGTON OF CLYFFE.

LORD WARRINGTON OF CLYFFE: My Lords, the action in which this appeal arises was an action for damages occasioned by the negligent driving of a motor car by the defendant's agent as a consequence of which it came into collision with a motor cycle ridden by the plaintiff with the result that the latter sustained serious injuries.

The defendant denied his agent's negligence and alleged contributory negligence on the part of the plaintiff.

The action was tried before the Lord Chief Justice of Northern Ireland and a special jury on the 15th November, 1928. The Judge left the following questions to the jury and the jury gave the answers hereinafter annexed to each question:—(1) Was the plaintiff on his proper side of the road when the collision happened? (A.) Yes. (2) Was the defendant guilty of negligence? (A.) Yes. (3) Did such negligence cause the accident? (A.) Yes. (4) Was

the plaintiff guilty of contributory negligence? (A.) Yes. (5) Damages (if any)? (A.) £400.

The learned Lord Chief Justice put the following supplemental question: In what respect was the plaintiff guilty of contributory negligence? To this the jury gave the answer: "Not keeping a proper look-out and having no light on his machine."

On these findings the Chief Justice refused to enter judgment for either party, leaving them respectively to move for judgment before the Court of Appeal.

This they both did, with the result that on the 29th February, 1929, the Court of Appeal, by a majority (Lord Justice Best dissenting), ordered judgment to be entered for the defendant with the costs of the action and the appeal.

The present appeal was then presented by the plaintiff who has obtained leave to prosecute it as a pauper.

The question as to whether the consequences of the contributory negligence of the plaintiff might have been avoided by the defendant was not put to the jury, the Chief Justice being of opinion that the whole affair began and ended in a moment of time and there was no evidence that the defendant could by any reasonable means have avoided the collision. This course was consented to by both parties.

The question to be decided by your Lordships' House is in my opinion the single question: Was there any evidence on which the jury could reasonably come to the conclusion that either of the specific acts of negligence on the plaintiff's part contributed to the accident?

The material facts for this purpose may be very shortly stated.

The collision happened on the 12th August, 1925, shortly after lighting-up time, at the apex of an obtuse angled bend on the right-hand side of the road from Portadown to Moy. The plaintiff was riding his motor cycle toward Portadown on his proper side of the road and was rounding the bend close to that side. The defendant (by which expression it is convenient to refer to the agent who was driving) came round the bend from Portadown on his wrong side, hit the off side of the motor cycle with the off side of his own car and caused the damage.

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As to the negligence of the defendant there is no question. He was not, it is true, driving at an excessive speed —the evidence puts it at 15 to 20 miles an hour—but he was trying to round the bend on his wrong side without having ascertained that the road was clear. I think it is plain that the jury must have accepted and acted on the evidence of Martha McCooe, the only independent eye witness, who was ten yards from the place where the accident occurred, walking on the left side of the road towards Moy. She said: "Defendant's car passed me on middle of road—on my own right; coming to bend of road defendant's car cut the corner—not room for a woman with pram to pass." She also said—a point in the defendant's favour—"Defendant's car was lighted when it passed me; he sounded his horn; I did not hear plaintiff's horn."

On the plaintiff's side, he was travelling at 10-12 miles an hour. He was on his proper side hugging the bend. It is true he had no light.

Now, to turn to the jury's findings. They find against him two acts of negligence and two only, viz.:—(1) That he was not keeping a good look-out, and (2) that he had no light. As to the first there was no evidence at all except the bare fact that he does not appear to have been aware of the presence of the defendant's car.

I cannot think that this by itself is evidence of negligence in this case. Even had he heard the horn and seen the light he would not necessarily realise that the car the approach of which was thus indicated would come round the bend on its wrong side, nor is it shown that even if he had realised this there was anything he could have reasonably done to avoid it.

As to the second it is said that it must be inferred that if the plaintiff had had a light the defendant would have seen it and thus been aware that something was approaching the bend and have abstained from attempting to cut the corner as he did. But in my opinion there is not nearly enough evidence to enable such an inference to be drawn. In the first place there is no evidence as to the condition of the atmosphere—all that is known is that the time was shortly after ten o'clock on an evening in the middle of August. It may have been a thick evening or a bright one,

circumstances bearing materially on the effect the presence of a light would have had. Again there was no evidence as to the kind of lamp carried by the plaintiff. It must also be borne in mind that coming as he did round a bend bordered by a high hedge and on his wrong side the defendant was not in so favourable a position for realising the warning conveyed by a light as he would have been if the plaintiff had kept to his own side. But lastly the plaintiff himself nowhere even suggests that he was misled by the absence of a light or would under all the circumstances have acted differently had he seen one.

On the whole I think the jury were too hasty in drawing the inference they did, and that there was no evidence on which they could properly find that the two acts of negligence relied on by them or either of them contributed to the accident.

In the result I am of opinion that the judgment of Lord Justice Best was correct, that the order appealed from should be reversed and that judgment should be entered for the plaintiff for the damages assessed by the jury with costs in both Courts below and that he should have such costs in this House as are usual in pauper appeals.

LORD THANKERTON: My Lords, I concur in the motion proposed by the noble Viscount on the Woolsack. In my opinion the course that the trial took and the answers of the jury to the questions put to them make clear that they found against the appellant on the question of contributory negligence, and that, notwithstanding that finding, the respondent is entitled to have judgment entered for him. But I have come to the opinion that the finding of contributory negligence was unsupported by evidence.

It must be taken as established that the appellant was hugging the edge of the road on his proper side of the road and that the respondent left his proper side in order to cut the corner and collided with the appellant while the latter was still hugging his proper side of the road. The jury's finding of negligence against the respondent was clearly based on this view.

The jury found the appellant guilty of contributory negligence in respect of not keeping a proper look-out and having no light on his machine. There was clearly evidence

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on which the jury were entitled to find that the appellant did not keep a proper look-out, and the appellant admitted that he had no light; in these two respects the appellant was negligent, but I am unable to find evidence to justify the finding that either of these acts of negligence contributed to the collision.

As regards the question of look-out, the contention must be that, if he had kept a proper look-out, the appellant would have been able by some further or different action on his part to avoid the collision. In the circumstances I am unable to conceive any such further or different action which the appellant could have been expected to take. He was already hugging the edge of the road on his proper side, leaving about fourteen feet of the roadway free for the passage of the other car. There is no suggestion in the evidence of any action which the appellant could have taken. I am of opinion therefore that the finding of contributory negligence on this head cannot be supported.

I have had more difficulty as to the absence of a light on the appellant's machine, but I have come to the conclusion that there is no evidence to show that the appellant's negligence in this respect contributed to the collision. In contrast with the look-out question, the contention here must be that the absence of a light deprived the respondent of the opportunity of taking some further or different action which would have avoided the collision, but both the pleadings and the evidence are innocent of any suggestion as to what the respondent would have been enabled to do had there been a light on the appellant's motor cycle. There is no evidence as to the nature of the light on the appellant's cycle, the conditions of visibility on the occasion in question, or the way in which, or the distance at which, the respondent would have seen such a light and been warned of the appellant's approach. The respondent himself makes no reference to this question in his evidence. We are therefore left entirely in the dark as to what further or other action the respondent was deprived of the opportunity of taking by the absence of a light on the appellant's cycle. Accordingly, I am of opinion that the jury's finding of contributory negligence cannot be supported on either head, and that the appellant is entitled to have judgment entered for him.

Questions put:

That the order appealed from be reversed.

The Contents have it.

That judgment be entered for the appellant for the sum of £400.

The Contents have it.

That the respondent do pay to the appellant his costs here and below, the costs of the appeal to this House to be taxed in the manner usual when the appellant sues *in formâ pauperis*.

The Contents have it.

Agents for the appellant: *C. Butcher & Simon Burns* for *T. D. Gibson*.

Agents for respondent: *Herbert Z. Deane & Co.* for *R. M. Cullen*.

J. D. C.

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REX (NEVIN) v. CLARKE (1).

Nov. 18.

Game—Pursuit of by greyhound—Game Certificates (Ireland) Act, 1842 (5 & 6 Vict., c. 81), sections 2, 5—Coursing—Game Licences Act, 1860 (23 & 24 Vict., c. 90), section 5, exception 3—Irregular Service of Summons—Waiver.

The defendant was prosecuted for pursuing a hare with a greyhound without having a game certificate, contrary to the provisions of sections 2, 5, of the Game Certificates (Ireland) Act, 1842 (5 & 6 Vict., c. 81). The defendant had coursed a hare with a single greyhound on certain lands, but produced a written permission from the owner of the lands to do so. The Resident Magistrate, being of opinion that the essential point of the prosecution was failure to take out a game licence and as the summons was brought under the Game Certificates (Ireland) Act, 1842, and not for trespass in the pursuit of game, held that the question of permission was immaterial and adjourned the hearing until the following Petty Sessions to enable both parties to consider the effect of the exception contained in the Game Licences Act, 1860, section 5.

At the resumed hearing it was contended on behalf of the defendant that the summons ought to have been served at least ten days before the hearing (as a fact the summons was only served two days before the hearing). The Resident Magistrate held that this point, not having been raised at the first hearing, was unsustainable.

The Resident Magistrate further held that failure to take out a licence under the Game Licences Act, 1860, formed the basis of the charge, that the defendant was exempted under section 5, exception 3, in respect of coursing a hare with his greyhound, and dismissed the summons on the merits, but stated a case for the King's Bench Division.

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the Resident Magistrate was wrong in deciding that defendant came within the third exception contained in section 5 of the Game Licences Act, 1860.

CASE STATED at the instance of the complainant for the opinion of the High Court of Justice in Northern Ireland, King's Bench Division, by S. C. Clarke, a Resident Magistrate, sitting alone as a Court of Summary Jurisdiction under the Game Preservation Act (Northern Ireland), 1928, at Newtownards, in the County of Down, pursuant to 20 & 21 Vict., c. 43.

The facts as proved or admitted were as follows:—

The defendant was summoned to appear at Newtownards Petty Sessions on 11th April, 1929, for that "You

(1) In the King's Bench Division before Moore, L.C.J., and Brown, J.

the defendant were found on the lands of Wm. David McConnell pursuing a hare with a greyhound without having a game certificate in force, contrary to the provisions of sections 2 & 5 of the Game Certificates (Ireland) Act, 1842." This summons was issued on 9th April, 1929, and served personally on defendant on the same day, to appear at Newtownards Petty Sessions on the 11th April, 1929.

At Newtownards Petty Sessions on 11th April, 1929, Jas. Ritchie, jun., and Hugh Donaldson proved that they saw defendant on McCracken's lands (which adjoin the lands of Wm. David McConnell) about 10-30 a.m. on the 17th March, 1929, and that the defendant's greyhound was then in pursuit of a hare on McCracken's land. Constable Hamill, R.U.C., proved that when cycling on patrol on the Cunningburn Road on that morning he saw the defendant's greyhound in pursuit of a hare on the lands of Wm. David McConnell and that at same time he also saw the defendant a little further away. The defendant went in the direction of Loughries. He (Constable Hamill) followed and shortly afterwards met or overtook the defendant on the County Road and told him that he had seen him hunting a hare with his greyhound. Defendant at first denied this, but then said: "Even so it is no business of yours because I have got permission from the farmer." Constable Hamill did not find the dead hare on defendant, and Mr. Stewart, Solicitor for defendant, stated that the greyhound had missed the hare. Mr. Stewart, Solicitor for defendant, contended that his client was not on McConnell's lands and that Constable Hamill was mistaken as to the ownership of the land and produced a written permission to hunt from McCracken. I held that the essential point of the prosecution was failure to take out a game licence, and inasmuch as the summons was brought under the Game Certificates (Ireland) Act, 1842, and not for trespass in pursuit of game under 27 Geo. 3, c. 35, or under the Poaching Prevention Act, 1862, the question of permission was immaterial, but I adjourned the hearing until the following Petty Sessions to enable both parties to consider the effect of the exemption from game licence for coursing hares in the Game Licence Act, 1860 (23 & 24 Vict., c. 90),

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section 5. At the re-hearing before me at Newtownards Petty Sessions on the 9th May, 1929, the evidence as given on 11th April, 1929, was repeated. Mr. Stewart, Solicitor for the defendant, did not contend that his client had a game licence, but, quoting from Farran's "The Game Laws of Ireland," page 68, submitted that:—

(a) "The summons must be served at least ten days before the hearing—4 & 5 Wm. 4, c. 51, section 19." I held that as the summons was served on 9th April, 1929, and this point had not been raised on the first hearing before me on 11th April, 1929, that I was now re-hearing the case on 9th May, 1929, this point of ten days' service before hearing was now unsustainable.

(b) That this was an excise prosecution for a fixed penalty upon failure by the defendant to pay £3 licence duty and the summons herein should have been issued on the information of an excise officer and proceedings commenced by order of the Commissioners of Inland Revenue and in the name of an officer of the Inland Revenue or of the Attorney General (Inland Revenue Regulation Act, 1890, 53 & 54 Vict., c. 21), and that the provisions of the Game Preservation Act (N. Ireland), 1928, did not give power to an officer or constable of R.U.C. to lay the information and take out a summons for the offence as charged.

The complainant contended:—

(1) In reference to the exemption for coursing upon which I had originally adjourned the summons—

(a) That this prosecution was brought under the Game Certificates (Ireland), Act, 1842 (5 & 6 Vict., c. 81), sections 2 & 5, which were not repealed by and were unaffected by the Game Licences Act, 1860 (23 & 24 Vict., c. 90).

(b) That (even admitting that the Game Licences Act, 1860, affected the provisions of the earlier Game Certificates (Ireland) Act, 1842) in the exception contained in section 5, clause 3, of the Game Licences Act, 1860, the words used were hares and greyhounds, and only exempted the pursuing and killing of hares by coursing with greyhounds, whereas the present charge was for pursuit of *a* hare with *a* greyhound.

(2) That he (the complainant) was authorised to prosecute by instructions or authority in writing from the

Ministry of Finance, Government of Northern Ireland, dated 26th March, 1929.

In coming to my decision against the complainant on his contention No. 1 (a) I had regard to the statement in O'Connor's Justice of the Peace under heading "Summary Offence, Game Laws," as follows:—"A Game Certificate is not required for killing rabbits, coursing hares, hunting hares or deer with hounds (Game Licence Act, 1860, 23 & 24 Vict., c. 90, s. 5).

In deciding against the complainant's contention No. 1 (b) I had regard to the Interpretation Act, 1889, section 1, s. s. 1 (b) which states: "Words in the singular shall include the plural and words in the plural shall include the singular." It is a matter of common knowledge that the pursuit of two or more hares simultaneously by two or more greyhounds is and has been absolutely unknown and to so construe the section would render liable to prosecution every owner who, not having taken out a game licence, trained or tried his greyhound singly after a hare or competed with his greyhound singly after a hare at a coursing meeting unless two hares were simultaneously started or released.

It further appeared to me illogical that the defendant should be fined in a sum of £20 for coursing a hare with one greyhound, not having paid £3 and taken out a game licence, and yet remaining immune from penalty if he had coursed the same hare with two or more greyhounds. Coursing a hare in olden times appears to have consisted of a trial of speed between the hare and a greyhound which pursued her by sight and not by scent, and in Murray's New English Dictionary, under heading of "Course," I find a quotation from Dryden as follows:—"So have I seen some fearful hare maintain a course till tired before the dog she lay." From the evidence or admissions I found upon questions of fact:—

That defendant did course a hare with his greyhound on the lands of Wm. David McConnell on 17th March, 1929.

That defendant had not previously paid £3 and obtained a licence to take or kill game.

I found upon questions of law that failure to take out a licence under 23 & 24 Vict., c. 90, formed the basis of the charge and that the defendant was exempted under

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section 5, clause 3, thereof in respect of coursing a hare with his greyhound and dismissed the summons on the merits.

Having been served by complainant with a requisition to state a case:—The opinion of the Court is sought as to:—

(a) Whether I was right in law in dismissing said complaint on the ground above stated.

(b) Whether the summons should have been dismissed upon the points raised by Mr. Stewart, Solicitor for the defendant, viz:—(a) "Which summons shall be served upon every such person or persons ten days at the least before the time appointed in such summons" (4 & 5 Wm. 4, c. 51, s. 19), (b) The District Inspector is not entitled to prosecute for an excise penalty in the name of the King or in his own name under the directions and authority in writing from the Ministry of Finance (Northern Ireland), and whether proceedings for the penalty claimed should be still commenced in the name of an officer of Inland Revenue or in the name of the Attorney General (53 & 54 Vict., c. 21, s. 21).

Babington K.C. (*Attorney-General*) and *J. G. Dougherty* for the plaintiff.

The Ministry of Finance are now exercising the functions of the excise department and officers of the Royal Ulster Constabulary are fully entitled to conduct excise prosecutions.

[BROWN, J.: Was the hare killed?]

Dougherty: There is no evidence that it was killed; no dead hare was found. There was an attempt to kill, but no actual killing. "Coursing" is not the same as "chasing." The Resident Magistrate found that an offence had been committed, and he would have convicted but for the effect of an exemption. We contend that the exemption on account of which the magistrate dismissed the summons does not cover the present case.

[MOORE, L.C.J.: I think that the several exemptions are meant to protect sport.]

Dougherty: Pursuit is sufficient to constitute the offence, although no actual killing has taken place. The words of the exception do not apply to the present case. These exemptions are meant to protect sport. The object of coursing is not to kill the hare but to test the dog, otherwise it might as well have been said that the Act shall not apply to greyhounds. "Coursing" is defined in the New English Dictionary as "the sport of chasing hares or other game with greyhounds, by sight." "There is a distinction between "pursuing" or "hunting" and "coursing." There is no suggestion in the evidence that the defendant was conducting in a genuine manner the sport of coursing, and section 2, exception 3, of the Game Licences Act, 1860, does not apply to the present case.

It is stated in Stone's Justices Manual (59th edition) at p. 171: "If the defendant appears at the hearing he must then object to the form of the summons, or to any irregularity in the proceedings on which it was founded; if he do not, but asks for judgment in his favour on the merits, he waives any irregularity in the process for bringing him before the court." In *Reg.* v. *Shaw* (1) Blackburn, J., said at p. 173: "I think when a man appears before justices, and a charge is then made against him, if he has not been summoned, he has good ground for asking for an adjournment. If he waives that, and answers the charge, a conviction would be perfectly good against him, and the witnesses, if they swore falsely, would be liable to indictment for perjury." The irregularity of service was waived in the present case by the defendant and his solicitor.

Hume for the defendant:—

The main element in coursing is chasing a hare by sight. There is nothing to prevent coursing with a single dog. The Case Stated found that what took place was coursing, and there was no evidence in the case inconsistent with that finding. There was evidence that the defendant was out for the training of his greyhound. I submit that the defendant was not bound to pay what amounted to an

(1) 34 L.J. 169.

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additional dog licence for the training of his greyhound. The fact that there was only one greyhound does not prevent section 5, exception 3, of the Game Licences Act, 1860, from applying. There was evidence that the greyhound was pursuing the hare for the purpose of sporting. Once it was established that this was the case of a greyhound in pursuit of a hare, the magistrate was entitled to find that it was doing so for the purpose of sporting and was within the exception. The decision of the magistrate should be confirmed. (He referred to *Waters* v. *Meakin*) (1).

MOORE, L.C.J.: This case comes before us by way of Case Stated. The defendant was charged with being found on the lands of William David McConnell pursuing a hare with a greyhound without having a game certificate in force, contrary to the provisions of sections 2 and 5 of the Game Certificates (Ireland) Act, 1842. It was proved by the evidence of two witnesses that the defendant was seen on lands adjoining the lands of William David McConnell with a greyhound in pursuit of a hare on those lands. Another witness proved that the defendant's greyhound was in pursuit of a hare on McConnell's lands.

The offence was created by section 2 of the Game Certificates (Ireland) Act, 1842. The penalty was imposed by section 5 of that Act. If the defendant on this occasion was "coursing" a hare within the meaning of the statute he would be saved by the 3rd exception contained in section 5 of the Game Licences Act, 1860. The Resident Magistrate held that this case came within the exception. The Act of 1860 protects from duty all forms of sport, it provides in section 5 that "the following exceptions and exemptions from the duties and provisions of this Act are hereby made and granted" including "(a) The pursuing and killing of hares respectively by coursing with greyhounds" (note the plural), "or by hunting with beagles or other hounds; (b) The pursuing and killing of deer by hunting with hounds; (c) The taking and killing of deer in any enclosed lands, by the owner or occupier of such lands, or by his direction or permission." The words "coursing with greyhounds" refer to the well known sport of

(1) [1916] 2 K.B. 111.

coursing. I do not think that it applies to a man going out with a greyhound, picking up what he could get. If that was the meaning of coursing, viz., going out with a single dog, why should not all other dogs be included also, such as a lurcher? The owner of the greyhound must be employed in the sport of coursing.

As to the point that the summons must be served at least ten days before the hearing, that point not having been raised at the first hearing was waived by the defendant. I am satisfied that the complainant had sufficient legal authority to prosecute.

I think the Resident Magistrate was wrong in deciding that the defendant came within the 3rd exception contained in section 5 of the Act of 1860, and the summons should not have been dismissed.

BROWN, J.: I agree with the judgment of the Lord Chief Justice. In my opinion the Resident Magistrate went wrong in two respects. In the first place, there was a *prima facie* case established. The onus was upon the defendant to bring himself within the exception. I think that the Resident Magistrate was wrong in holding that there was no evidence upon which the defendant could be convicted. I think that there was such evidence. In my opinion such coursing as has been disclosed was not within the exception, which refers to the coursing of hares in an organised way.

I agree that the case must be sent back to the Resident Magistrate for determination.

Solicitor for the plaintiff: *J. H. B. Gunning.*
Solicitor for the defendant: *Alexander Stewart.*

J.McC.

K.B.D.
1930.

June 26.

REX (WRIGHT)

v.

COUNTY COURT JUDGE OF TYRONE (1).

Intoxicating Liquor—Sale of during prohibited hours—Previous good character—Extenuating circumstances—Intoxicating Liquor Act (Northern Ireland), 1923 (13 & 14 *Geo.* 5, *c.* 12), *section* 8 (2).

At a Court of Petty Sessions held at O., in the County of T., on the 24th March, 1930, the Justices made an order convicting the defendant, J. G., who was a person duly licensed to sell intoxicating liquors by retail, of the offence of selling intoxicating liquor during prohibited hours, and directed the conviction to be recorded on the defendant's licence.

The defendant appealed to Quarter Sessions, and upon hearing the appeal, the County Court Judge made an order affirming the conviction, but as he was of opinion that the previous good character of the defendant might be treated as an extenuating circumstance, under section 8 (2) of the Intoxicating Liquor Act (Northern Ireland), 1923, he varied the order of the justices and directed the conviction not to be recorded, and he made his order a speaking order.

On the 16th May, 1930, the prosecutor obtained a conditional order for a writ of certiorari to bring up and quash the order of the County Court Judge upon the grounds that the reasons stated for the making of the order were erroneous in point of law, that the order was bad upon its face, and that it was made without and in excess of jurisdiction.

Upon motion to make the conditional order absolute:—

Held, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the previous good character of the defendant could not be treated as an extenuating circumstance under section 8 (2) of the Intoxicating Liquor Act (Northern Ireland), 1923, and that the decision of the County Court Judge was wrong.

CERTIORARI:

At a Court of Petty Sessions held at Omagh, County Tyrone, on the 24th March, 1930, upon the hearing of a complaint designated "the King at the prosecution of Captain W. Wright, D.I., R.U.C., complainant; James Gallagher, defendant," the justices made an order con-

(1) In the King's Bench Division before Moore, L.C.J. and Brown, J.

victing the defendant, who was a person duly licensed to sell intoxicating liquors by retail at his licensed premises at Main Street, Newtownstewart, County Tyrone, of the offence of selling intoxicating liquor during prohibited hours, and directed the conviction to be recorded on the defendant's licence. The defendant appealed to the Quarter Sessions held at Omagh on the 16th April, 1930, and upon hearing the appeal the County Court Judge made an order affirming the conviction, but as he was of opinion that the previous good character of the defendant might be treated as an extenuating circumstance, under section 8 (2) of the Intoxicating Liquor Act (Northern Ireland), 1923, he ordered that the conviction of the justices be varied and directed the conviction not to be recorded. It was contended on behalf of the complainant that the previous good character of the defendant, which was admitted, was not an extenuating circumstance in connection with the offence within the meaning of section 8 (2) of the Act.

The County Court Judge delivered judgment in favour of the defendant and made his order a speaking order.

On the 16th May, 1930, the prosecutor obtained a conditional order for a writ of certiorari to bring up and quash the order of the County Court Judge upon the grounds that the reasons stated for the making of the order were erroneous in point of law, that the order was bad upon its face, and that it was made without and in excess of jurisdiction.

The prosecutor now applied to have the order made absolute.

Babington K.C. (*Attorney General*) and *Dougherty* for the prosecutor:—

The words "in connection with the offence" must be taken in their plain meaning and cannot apply to the previous good character of the defendant. The decision of the learned County Court Judge was wrong, previous good character cannot be said to be "in connection with" the offence. (They referred to *Barnard* v. *Barton* (1) and *Glasgow* v. *O'Connor* (2).)

(1) [1906] 1 K B 357. (2) 45 I.L.T.R. 5.

K.B.D. 1930.

REX (WRIGHT) v. COUNTY COURT JUDGE OF TYRONE.

T. J. Campbell K.C. and *Sheil* for the defendant :—

If the legislature had intended to blot out previous good character as a defence, they would have done so in express terms. Unless words are perfectly clear, the resulting penalty should not be imposed.

We submit that it is competent for the Court to consider the previous good character of the publican as an extenuating circumstance in connection with the offence.

BROWN, J.

BROWN, J., having stated the facts, continued as follows :—

The effect of section 8, sub-section 2, of the Intoxicating Liquor Act (Northern Ireland), 1923, was pointed out to the magistrates. The magistrates were inclined to take into consideration the previous good character of the defendant. We have to consider what is the meaning of this section. The section directs that the conviction "shall be directed to be recorded on the licence" . . . . "unless the court by whom the conviction has been made is satisfied that by reason of the existence of extenuating circumstances in connection with the offence (which circumstances shall be specified in the order of the court), the conviction ought not to be recorded." The extenuating circumstances must be *in connection with the offence*. We are of opinion that these words point to some special circumstance affecting this particular offence, e.g., that the clock in the bar was not correct, that an accident had happened and stimulant was required for an injured person, or that a neighbour had asked for some whiskey for his wife who had been attacked by a fainting fit. These are examples of what, if the publican believed them, would be extenuating circumstances under the Act. We are of opinion that the County Court Judge was wrong in deciding that the previous good character of the defendant might be treated as an extenuating circumstance under section 8 (2) of the Intoxicating Liquor Act (Northern Ireland), 1923.

MOORE, L.C.J.

MOORE, L.C.J. : I can add nothing to the judgment delivered by Brown, J.

Solicitor for the prosecutor : *Chief Crown Solicitor.*
Solicitors for the defendant : *Shields & Murnaghan.*

J. McC.

IN THE GOODS OF ALEXANDER MULLIGAN, DECEASED (1).

C.A. 1930.

Jan. 30. March 4.

Probate—Administration—Parties Entitled—Universal Legatees —Practice—County Court Decree—Effect of—Probate Act (Ireland), 1857, (20 & 21 *Vict.*, *c.* 79), *section* 59.

A. M. died on 13th April, 1929, unmarried. By his will he bequeathed to James C. £35 on deposit receipt, and his land, cattle and other goods to John C. and James C. equally. The next of kin of the deceased were M. J. L. and John M., who resided in Northern Ireland, and C. M., M. M., and James M., who resided in the United States of America. M. J. L. and John M. entered a caveat against the issue of a grant of letters of administration with the will annexed to John C. and James C., and ultimately M. J. L. was made defendant in a testamentary civil bill which duly came on for hearing before the County Court Judge of F. The County Court Judge made a decree upholding the will, and, following the form of decree (F.1) prescribed, directed that administration with the will annexed should be granted to the plaintiffs, John C. and James C. An application was made to the Probate Registry for a grant of administration with the will annexed to John C. and James C. The Chief Registrar required the three next of kin, resident in the United States of America, to be cited to accept or refuse the grant, and refused the application until these parties had been disposed of.

The applicants applied ex parte to the Lord Chief Justice for an order that the grant should be made to them. When the application first came before the Lord Chief Justice, the ground given for dispensing with the service of citations on the three next of kin resident in the United States of America was that their whereabouts was not known. Moore, L.C.J., adjourned the application, and directed the registrar to communicate with the next of kin resident in Northern Ireland, who had been defendants in the civil bill regarding their brothers and sister in the United States, and in reply it was stated that they were all living together at an address in New York.

On the matter coming again before Moore, L.C.J., he directed that the applicants should be at liberty to issue a citation to accept or refuse administration against the three next of kin in America. The applicants appealed, and it was contended on their behalf (a) that they were universal legatees under the will and as such were entitled to the grant in priority to the next of kin; and (b) that section 59 of the Probate Act (Ireland), 1857, was conclusive of the applicants' right to the grant, and that the registrar had really no option, and must issue the grant to the applicant in whose favour the decree had been made.

Held, by the Court of Appeal:—(a) That the applicants were not universal legatees under the will, and were not entitled to the grant in priority to the next of kin; (b) that section 59 of the Probate Act

(1) In the Court of Appeal before Andrews and Best, L.JJ.

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(Ireland), 1857, does not expressly provide that the grant must necessarily be made to the applicant in whose favour the decree had been made, if the registrar is satisfied as to the existence of any other person possessing a prior right which would make a grant to the applicant improper. The order of Moore, L.C.J., was therefore affirmed.

APPEAL from an order made by Moore, L.C.J.

Alexander Mulligan, who was a bachelor, died at More, in the County of Fermanagh, on 13th April, 1929. He left a will which he executed as a marksman on 10th April, 1929. By this will he bequeathed £35 on deposit receipt to James Carey, and all the land belonging to him and the cattle on the said land to John Carey and James Carey to be equally divided between them. He had for a long time prior to his death resided with the Careys. The next of kin of Alexander Mulligan were Mrs. Mary Jane Lynch and John Mulligan, of Fermanagh, and Miss Cassie Mulligan, Michael and James Mulligan, who resided in the United States of America. Mrs. Mary Jane Lynch and John Mulligan entered a caveat against the issue of a grant of letters of administration with the will annexed to John and James Carey, and, ultimately, Mary Jane Lynch was made defendant in a testamentary civil bill which came on for hearing on 21st June, 1929, for the purpose of determining the validity of the will. The County Court Judge of Fermanagh made a decree upholding the will, and following the form of decree (F.1) prescribed for the County Courts by Quarter Sessions Rules of 12th July, 1858, directed that administration with the will annexed should be granted to the plaintiffs.

An application was made to the Probate Registry in Belfast, pursuant to the decree of the County Court Judge, for a grant of administration with the will annexed to John and James Carey. The Chief Registrar required the three next of kin, resident in the United States of America, to be cited to accept or refuse the grant, and refused the application until these parties had been disposed of. As this occurred during the long vacation, a memorandum was by agreement sent to the Lord Chief Justice who upheld the ruling of the registrar. The applicants applied by motion ex parte to the Lord Chief Justice for an order that the grant should be made to them.

The ground relied on by the applicants on the hearing of the application before the Lord Chief Justice for dispensing with the service of citations on the three next of kin resident in the United States of America, was that their whereabouts was not known. The Lord Chief Justice adjourned the application and directed the registrar to communicate with the next of kin resident in Fermanagh, who had been defendants in the civil bill, regarding their brothers and sister in the United States of America, and in reply it was stated that they were living together at 165 West 76 Street, New York.

The matter again came before the Lord Chief Justice on 29th November, 1929, when he directed that the applicants should be at liberty to issue a citation, to accept or refuse administration, against the three next of kin in America.

The applicants appealed to the Court of Appeal.

Pringle K.C. and *Porter* for the applicants:—

It is stated in Miller's Probate Practice (1900 edition) that "The order in case of a will is as follows:—Executors, residuary or universal legatees in trust, beneficial residuary or universal legatees, and legatees. Where the residue is undisposed of the widow and next of kin stand in the place of the residuary legatees." The County Court Judge has the same authority as the High Court, in matters within his jurisdiction. It should not be assumed that the County Court Judge had not jurisdiction to make the order. The case made by the applicants from the beginning was as universal legatees. They are universal legatees under the will and as such are entitled to the grant in priority to the next of kin.

The County Court Judge has made a decree not only upholding the will but directing that letters of administration with the will annexed be granted to the applicants, and as this decree has not been appealed from, it is final and binding.

Section 59 of the Probate Act (Ireland), 1857, is conclusive of the applicant's right to the grant, and the Chief Registrar has no option and must issue the grant to the applicant in whose favour the decree has been made. The Court should not find that there is a power in the probate

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IN THE GOODS OF ALEXANDER MULLIGAN.

officer which is superior to the power of the County Court Judge.

In Re Macinerney (1) is altogether in the applicants' favour.

Cur. adv. vult.

ANDREWS, L.J. March 4.

ANDREWS, L.J.: The judgment which I am about to read is the judgment of the Court.

The deceased, Alexander Mulligan, who was a bachelor, died at More, in the County of Fermanagh, on 13th April, 1929. He left a will which he executed as a marksman on 10th April, 1929. By this will he bequeathed £35 on deposit receipt to one James Carey, and all his land in Kilturk North to John Carey and the said James Carey to be equally divided between them, and also the cattle on the land to be equally divided between John and James Carey. The deceased had for a long time prior to his death resided with the Careys. The next of kin of the deceased were Mrs. Mary Jane Lynch and John Mulligan, of Fermanagh, and Miss Cassie Mulligan, Michael and James Mulligan, all of whom resided in the United States of America. The two first-named next of kin entered a caveat against issue of a grant of letters of administration with the will annexed to John and James Carey; and, ultimately, Mary Jane Lynch was made defendant in a testamentary civil bill which came on for hearing on 21st June, 1929, for the purpose of determining the validity of the said will. The learned County Court Judge of Fermanagh made a decree upholding the will, and, following the form of decree (F.1) prescribed for the County Courts by Quarter Sessions Rules of 12th July, 1858, directed that administration with the said will annexed should be granted to the plaintiffs.

In due course an application was made to the Probate Registry in Belfast, pursuant to the said decree, for a grant of administration with the will annexed to John and James Carey. Following the established practice of the office the chief registrar required the three next of kin

(1) 5 L.R.I. 553.

resident in the United States of America whom he regarded as parties entitled in priority to the applicants, to be cited to accept or refuse the grant, and refused the application until these parties had been disposed of. As this occurred during the long vacation, a memorandum was by agreement sent to the Lord Chief Justice, who upheld the ruling of the registrar. Dissatisfied with the decision the applicants applied *ex parte* to the Lord Chief Justice by motion paper on 22nd November. The contents of this motion paper are of importance. After setting out the names of the five next of kin as above mentioned, all of whom were lawful brothers or sisters of the deceased, it was stated that Michael Mulligan, James Mulligan and Cassie Mulligan emigrated to the United States of America many years ago, and that their present whereabouts is not known. After stating other material facts, including the decree of the County Court Judge, the motion paper concluded with an intimation that the Court would be moved on behalf of John and James Carey for an order that the grant should be made to them. The affidavit in support of the motion was prepared on similar lines; and there can be no doubt that the real ground relied on in these documents and on the actual hearing of the application by the Lord Chief Justice for dispensing with the service of citations on the three next of kin resident in the United States of America was that their whereabouts was not known. The Lord Chief Justice adjourned the application and directed the registrar to communicate with the next of kin resident in Fermanagh, who had been defendants in the civil bill, regarding their brothers and sister in the United States of America; and in reply to such letters it was stated that they were all living together at 165 West 76 Street, New York. Accordingly, when the matter again came before the Lord Chief Justice on 29th November, 1929, he directed that the applicants should be at liberty to issue a citation to accept or refuse administration against the three next of kin in America to be served by registered post. From this order the present appeal has been taken.

The ascertainment of the whereabouts of these three next of kin made it necessary for Mr. Pringle, K.C., who

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was brought in to lead Mr. Porter before us, to present what we are satisfied was at least in part a new argument which had not been submitted to the Lord Chief Justice. His contention was that the applicants were universal legatees under the will, and as such were entitled to the grant in priority to the next of kin. There is no doubt that both residuary and universal legatees have a right to the grant in preference to next of kin; but, if there is a residue undisposed of, the rights of next of kin are paramount to those of ordinary legatees. Mr. Pringle's argument, however, fails in the present case, because his clients are not, as he submits, universal legatees. In the first place, they are not such on the form of the will which deals specifically with a deposit receipt, a farm of land, the cattle thereon, and nothing else. It is quite incredible that the testator was not possessed of some other assets such as his personal wearing apparel; and just as such clothing, though of little value, may be sufficient to found the jurisdiction of the Court to issue a grant, so it is in our opinion sufficient to prevent specific legatees or devisees of other property being regarded in law as "universal legatees." Even if, however, there were no such other assets, as we have suggested, there would be another equally fatal objection to Mr. Pringle's argument. When certain property is left by a testator to A and the remainder of his property to A and B, it is quite a misuse of the term to refer to A and B as universal legatees. They are not both interested in or entitled to *all* his property. One might as well say that if a testator were possessed of twelve personal chattels and no other assets whatever, and he left each article to a different legatee, they would collectively be properly described to be his universal legatees. This argument of Mr. Pringle's, accordingly, fails.

Mr. Pringle, however, made a second submission which was quite independent of the first. The learned County Court Judge, he contended, had made a decree not only upholding the will but directing that letters of administration with the will annexed be granted to the plaintiffs, and that as this decree had not been appealed from it was final and binding. He referred us to section 59 of the Probate Act (Ireland), 1857, which provides that: "On

a decree being made by an assistant barrister for the grant or revocation of a probate or administration in any such cause, the clerk of the peace of the county shall transmit to the district registrar of the district in which it shall have been sworn that the deceased had at the time of his decease his fixed place of abode a certificate of such decree having been made; and thereupon, on the application of the party or parties in favour of whom such decree shall have been made, a probate or administration in compliance with such decree shall be issued from such district registry; or, as the case may require, the probate or letters of administration theretofore granted shall be recalled or varied by the district registrar according to the effect of such decree." This section, Mr. Pringle submitted, was conclusive of his clients' right to the grant; and that the registrar had really no option, and must issue the grant to the applicant in whose favour the decree had been made.

We are of opinion that this view cannot be supported as it would be contrary to both the settled practice of the Probate Court, and to accepted authority. The duty of the County Court Judge in the making of decrees upon testamentary civil bills was clearly stated by Warren, J., on the hearing of an appeal in *Bell* v. *Hughes* (1). The decree in that case, after declaring the validity of the will, directed that letters of administration with the will annexed should be granted to the plaintiff, ignoring the title of the executors to probate. "This," said the learned Judge, "was plainly erroneous, and the direction must be omitted from the order. I may observe that it will be found convenient that when a controversy in a case relates only to the validity of a will, the selection of the grantee, whether as executor or administrator, should be left to the proper officer of the Probate Court, subject to appeal if he should err in the selection."

A few weeks later the matter was again considered by the same Judge in *In the goods of John McInerney deceased* (2). Whilst indicating that it is the duty of the chief and district registrars to obey as far as possible decrees of the County Courts, he approved

(1) 5 I.R.I. 407. (2) 5 L.R.I. 553.

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of the conduct of the chief registrar in refusing to do so in that case, as a probate cannot be granted to a person not named as executor, and an executor can only be named in the will. "I wish to add," he said, "that the general practice of this Court when a will is established or condemned either in solemn form or upon motion is to declare the opinion of the Court upon the validity of the will, leaving it to the officer of the registry to select the grantee, whether of probate or administration; and perhaps, I may be permitted to suggest that a similar practice would be found convenient in the County Courts; otherwise, there will often be some danger of selecting as the grantee a person entitled as between the parties before the Court, but having no title as against parties not before the Court."

Since the cases were heard—now 50 years ago—we understand that many of the County Court Judges, in obedience to such direction, have omitted from their decrees all reference to the person to whom the grant should issue; and that, in cases in which decrees have contained such a direction, the registrar has required all persons having prior rights to the grant to be cited and cleared off before issuing the grant to the person named in the decree. This practice, we are informed, has been in all cases either acquiesced in by the applicants or approved of by the Judge; and in our opinion it should not now be disturbed unless it is clearly at variance with the statute law. Apparently, it would not have been so regarded by Warren, J., and we concur in this view. When section 59 of the Act of 1857 is carefully considered, it will be found that it is really concerned only with whether the decree of the County Court Judge provided for probate or administration, i.e., whether he decided for or against the will; and it is upon a certificate being transmitted as to this that "a probate or administration in compliance with such decree shall be issued." No doubt this is done under the section "on the application of the party or parties in favour of whom such decree shall have been made"; and, whilst in the vast majority of cases the grant would be properly made to such party as the person legally entitled thereto, the section does not

expressly provide that the grant must necessarily be made to such person if the registrar is satisfied as to the existence of any other person possessing a prior right which would make a grant to the applicant improper.

For these reasons we affirm the order of the Lord Chief Justice.

We only wish to add that as the entire difficulty has arisen in this case from the concluding words of the form of decree (F.1) in the Schedule of the Rules of 12th July, 1858, we would commend the consideration and amendment of this form to the rule-making authority. Such amendment would not only conform with the opinion of Warren, J., which we have quoted above, but it would also prevent a recurrence in the future of the difficulty which has arisen in the present case.

Solicitor for the applicants: *John G. Magrath.*

J. McC.

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AGRICULTURAL SOCIETY — WINDING UP—*Rules—Allotment of loan guarantee shares to members not applying therefor—Liability of members—Industrial and Provident Societies Act*, 1893. (56 *and* 57 *Vic.*, *c.* 39.) The Foreglen Co-operative Agricultural Society, Limited, was incorporated and registered on 27th February, 1919, under the Industrial and Provident Societies Act, 1893. The committee were empowered by the rules of the Society to obtain loans "to an extent not exceeding such amount as may be authorized by a general meeting." The rules further provided that, for the purpose of securing advances, the Society might issue to every member such number of loan guarantee shares of the nominal value of £1 each as would be equal to the number of ordinary shares held by each such member, and that each member should be bound to apply for, and accept, allotments of such loan guarantee shares when making application for ordinary shares. When the allotment of the ordinary shares of the Society took place, no loan guarantee shares were then issued or applied for. In consequence of losses which the Society incurred, the committee, in December, 1920, found it necessary to obtain a bank overdraft amounting to £1,700. Subsequent trading proved unsuccessful, and in the year 1925 seven members of the committee gave their personal guarantees to the Northern Banking Company, Limited, in respect of the Society's indebtedness. In December, 1926, notices were sent out convening a special meeting of the Society and intimating that members would be asked to apply for loan guarantee shares, and that, failing applications, such shares would be issued to members to the extent to which they were obliged to accept the same. This meeting was held on 17th December, 1926, and, no applications for loan guarantee shares being received, such shares were forthwith allotted to members in accordance with the terms of the notice convening the meeting. On 14th February, 1928, an order for the winding up of the Society was made, and the Chief Clerk included in the list of contributories the names of the persons to whom loan guarantee shares had been allotted. The members affected moved to vary the Chief Clerk's Certificate on the ground that they had been wrongly included in the list of contributories. They relied, *inter alia*, on the following contentions:—(a) That the issue of loan guarantee shares was defective, inasmuch as such shares could only be issued at the same time as the ordinary shares and only for the purpose of securing particular advances about to be made to the Society. (b) That the loan which had been obtained from the Bank was unauthorized, as it had not been sanctioned by a general meeting as required by the rules. (c) That no applications for loan guarantee shares had been made as required by the rules or by the general law. The applicants' motion was dismissed and the Chief Clerk's Certificate was confirmed. From this order a number of contributories appealed. *Held*, by the Court of Appeal, affirming the decision of Wilson, J., that the liability of each member to accept loan guarantee shares was an original liability from the time of his joining the Society, and that the appellants were liable, as contributories, in respect of the loan guarantee shares allotted to them. *In re the Foreglen Co-operative Agricultural Society*.
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spiracy, and, also, that the compensation under section 84 of the Companies (Consolidation) Act, 1908 (on this point Andrews, L.J., dissented) was wider than that for fraudulent misrepresentation, and directed a new trial. The House of Lords (1), affirming the Court of Appeal, *held* that there was evidence to go to the jury in respect of each of the causes of action; and, *Held*, reversing the Court of Appeal, that the respondent having accepted the £130 in satisfaction of one of the alternative causes of action, and such sum being sufficient to cover the damages on any of the causes of action, no new trial should be allowed upon the other alternatives; and, *Held*, reversing the majority of the Court of Appeal and affirming Andrews, L.J., that the measure of compensation under section 84 of the Companies (Consolidation) Act, 1908, was the same as the measure of damages for fraudulent misrepresentation. *McConnell* v. *Wright* [1903] (1 Ch. 546) and *Breadon* v. *Capital Syndicate, Ltd.* (28 T.L.R. 394), discussed. *Clark and Others* v. *Urquhart. Stracey and Others* v. *Urquhart.*

[H.L. 4

COMPANY (2)—WINDING UP—*Sums allotted to directors—Whether "sums due to members of company in character of members by way of dividends, profits or otherwise" — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 123, *sub-s.* 1 (vii). In October, 1907, R. B. P., J. G. M., J. J. M., R. G. S. and J. H., five directors of C. P. & Co., Ltd., entered into agreements, under which they became employees of the Company, each receiving a salary and one fifth of the net profits. The agreements were to remain in force for ten years, unless terminated as therein provided. R. B. P., one of these directors, being unable to attend to the business of the Company, entered into a new agreement, dated 14th June, 1911, whereby his prior agreement was annulled, and it was agreed that he and his personal representatives should continue to be paid one fifth of the net profits, so long as he or they retained the share interest in the capital of the Company, which he then held, in one undivided holding. The agreements with the other directors were not cancelled, but, by supplemental agreements, it was provided that if they gave up their employment with the Company, they also would continue to receive their respective one fifth shares of the net profits, so long as their respective shares in the capital of the Company were retained in one holding. J. H. died in 1913; R. G. S. died in 1914; R. B. P. died in 1919. In the year 1920 £3,000 was appropriated in respect of the directors' shares of the net profits, payable under their agreements, and was placed to the credit of a directors' remuneration account. This sum was subsequently divided into five sums of £600 and placed to the credit of their respective deposit accounts with the Company. The Company had power under its Articles of Association to fix the remuneration of directors, and in pursuance of a resolution passed at the annual meeting of the Company held on 11th June, 1920, a sum of £3,500 was placed at the disposal of the managing directors, then I. J. M. and J. G. M. and two others, as a bonus for the year 1919-20. Of this sum, £1,300 was allotted to I. J. M. and £1,300 to J. G. M. These amounts were, however, not paid out, but were retained by the Company and placed to the credit of their respective deposit accounts in the year 1925. The Company, having become insolvent, went into voluntary liquidation in the year 1928, and up to that time the five sums of £600 and the two sums of £1,300 had not been paid to the persons who claimed to be entitled to them. *Held*, that the sums of £600, claimed by the personal representatives of R. G. S. and R. B. P. and J. H. respectively, were sums due to members of the Company in their character of members by way of dividends, profits or otherwise, within the meaning of section 123, sub-s. 1 (vii) of the Companies (Consolidation) Act, 1908, and accordingly the persons claiming these sums were not entitled to compete with the ordinary creditors of the Company in respect thereof. And *Held*, that I. J. M. and J. G. M., having continued their employment with the Company until after 11th June, 1920, the sums of £600 claimed on their behalf were sums payable to them under their contracts of employment, and not in their character of members of the Company, and accordingly did not come within the provisions of section 123, sub-s. 1 (vii).

And *Held*, that the sums of £1,300 due to I. J. M. and to the personal representatives of J. G. M. respectively, were sums given to them, not by agreement, but under the Articles of Association, and consequently were not payable to them in their character of members within the meaning of section 123, sub-s. 1 (vii). *In re Leicester Club and County Racecourse Co., Ex parte Cannon* [30 Ch. D. 629] dissented from. *In re Date and Plant* [43 Ch. D. 255] followed. *In re Cinnamon Park & Co., Ltd.* [Ch. Div. 47

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FISHERIES—STATUTORY LIABILITY to erect grating in tail race—*Adjoining owner—Trespass*—5 & 6 *Vic.*, *c.* 106, *s.* 76. The defendant was fined £5 at Petty Sessions for failing to erect a grating or lattice across the tail race of his mill at a point where the tail race re-enters the river "F." The river "F" is a river in which there are salmon. For a certain distance before and at the point where the tail race re-enters this river it is bounded on both sides by lands that belong to an adjoining owner, and not to the defendant, the owner of the mill. There was no grating or lattice on the tail race where it diverged from or re-entered the river; to construct the grating or lattice, it would be necessary to erect piers that would project into the banks, on the side of the tail race, the property of the adjoining owner. The defendant had started the necessary work of erecting the grating, but had abandoned it in consequence of the objection of the adjoining owner to any trespass on his lands. The defendant had the use of the tail race from the moment it left his own lands until it reached the river. The defendant appealed to the Recorder of L. It was contended, on behalf of the defendant, before the Recorder that where a trespass on adjoining property was necessary in order to erect a grating, the person occupying the watercourse within the meaning of section 76 of 5 & 6 Vic., c. 106, could not be compelled to erect the grating. The Recorder of L. *held* that the defendant's contention that the erection of the lattice involved a trespass on an adjoining owner was no answer to a prosecution under section 76 of 5 & 6 Vic., c. 106, and confirmed the conviction. The matter came before the King's Bench Division on June 24th, 1929, on a motion to make absolute a conditional order for a writ of certiorari. The King's Bench Division adjourned the further hearing of the motion, and directed that the conditional order and the order adjourning the motion should be served on the adjoining owner to enable him to assert or defend his title. The motion came on again for further hearing on July 8th, 1929, the adjoining owner being represented by counsel. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the defendant was under a statutory obligation to erect the grating even though it entailed an interference with the banks of the adjoining owner, that the Recorder was right in point of law in affirming the decision of the Magistrates and that the motion should be refused and the conditional order discharged. *The Recorder and Justices of the Peace for the County of Londonderry.* [K.B.D. 104

GAME—PURSUIT OF BY GREYHOUND—*Game Certificates (Ireland) Act*, 1842 (5 & 6 *Vict.*, *c.* 81), *sections* 2, 5—*Coursing—Game Licences Act*, 1860 (23 & 24 *Vict.*, *c.* 90), *section* 5, *exception* 3—*Irregular Service of Summons—Waiver.* The defendant was prosecuted for pursuing a hare with a greyhound without having a game certificate, contrary to the provisions of sections 2, 5, of the Game Certificates (Ireland) Act, 1842 (5 & 6 Vict., c. 81). The defendant had coursed a hare with a greyhound on certain lands, but produced a written permission from the owner of the lands to do so. The Resident Magistrate, being of opinion that the essential point of the prosecution was failure to take out a game licence and as the summons was brought under the Game Certificates (Ireland) Act, 1842, and not for trespass in the pursuit of game, held that the question of permission was immaterial and adjourned the hearing until the following Petty Sessions to enable both parties to consider the effect of the exception contained in the Game Licences Act, 1860, section 5. At the resumed hearing it was contended on behalf of the defendant that the summons ought to have been served at least ten days before the hearing (as a fact the summons was only served two days before the hearing). The Resident Magistrate held that this point, not having been raised at the first hearing, was unsustainable. The Resident Magistrate further held that failure to take out a licence under the Game Licences Act, 1860, formed the basis of the charge, that the defendant was exempted under section 5, exception 3, in respect of coursing a hare with his greyhound, and dismissed the summons on the merits, but stated a case for the King's Bench Division. *Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.)) that the Resident Magistrate was wrong in deciding that defendant came within the third exception contained in section 5 of the Game Licences Act, 1860. *Rex (Nevin)* v. *Clarke*.

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INTOXICATING LIQUOR—Sale of during prohibited hours—PREVIOUS GOOD CHARACTER—EXTENUATING CIRCUMSTANCES—*Intoxicating Liquor Act (Northern Ireland)*, 1923 (13 & 14 *Geo.* 5, *c.* 12), *section* 8 (2). At a Court of Petty Sessions held at O., in the County of T., on the 24th March, 1930, the Justices made an order convicting the defendant, J. G., who was a person duly licensed to sell intoxicating liquors by retail, of the offence of selling intoxicating liquor during prohibited hours, and directed the conviction to be recorded on the defendant's licence. The defendant appealed to Quarter Sessions, and upon hearing the appeal, the County Court Judge made an order affirming the conviction, but as he was of opinion that the previous good character of the defendant might be treated as an extenuating circumstance, under section 8 (2) of the Intoxicating Liquor Act (Northern Ireland), 1923, he varied the order of the Justices and directed the conviction not to be recorded, and he made his order a speaking order. On the 16th May, 1930, the prosecutor obtained a conditional order for a writ of certiorari to bring up and quash the order of the County Court Judge upon the grounds that the reasons stated for the making of the order were erroneous in point of law, that the order was bad upon its face, and that it was made without and in excess of jurisdiction. Upon motion to make the conditional order absolute :—*Held*, by the King's Bench Division (Moore, L.C.J., and Brown, J.), that the previous good character of the defendant could not be treated as an extenuating circumstance under section 8 (2) of the Intoxicating Liquor Act (Northern Ireland), 1923, and that the decision of the County Court Judge was wrong. *Rex (Wright)* v. *County Court Judge of Tyrone*.

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thern Ireland Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 34), *Sched. III.* A number of holdings on the estate of G. were subject to judicial rents, which had been fixed by agreements which were entered into before 15th August, 1911, and filed in the Irish Land Commission after that date. By virtue of Sched. III to the Northern Land Act., 1925, judicial rents fixed after 15th August, 1911, are deemed to be third term judicial rents, and the standard purchase annuities are calculated accordingly. When the estate was about to become vested in the Land Purchase Commission, the holdings in question were described in the provisional list as being subject to third term judicial rents. The tenants affected objected to their holdings being so described. *Held* (reversing the decision of the Land Purchase Commission), that the dates upon which the agreements were filed were the dates upon which the judicial rents were fixed, and accordingly the holdings were correctly described in the provisional list as being subject to third term judicial rents. *Estate of George Thomas Graham.*

[C.A. 1

LAND REGISTRY (1)—LOCAL REGISTRATION OF TITLE—CONCLUSIVENESS OF THE REGISTER—*Sale of registered lands by Administrator—Subsequent discovery of Will—Transfer not registered—Sub-division—Northern Ireland Land Act*, 1925 (15 *and* 16 *Geo.* 5, *c.* 34), *s.* 30 (1)—*Case stated—Effect of.* Letters of administration were granted to the brother of a man who was erroneously presumed to have died intestate. The administrator, as personal representative of the deceased, sold and conveyed to a purchaser a portion of the lands belonging to the deceased. Upon the subsequent discovery of a will, the plaintiff obtained a grant of probate. On 2nd January, 1923, P. McG., who had obtained a grant of letters of administration, put up the lands for sale, and on 18th January, 1923, the defendant signed an agreement for purchase for the sum of £80. The agreement incorporated in the contract the conditions of sale, in No. 6 of which it was erroneously stated that the vendor was registered, pursuant to the Local Registration of Title (Ireland) Act, 1891, as owner. This condition further stated that the vendor was selling as beneficial owner, but that for further assurance to the purchaser he would join as personal representative of the former registered owner. The Land Commission refused to consent to the sub-division of the lands. In a civil bill on the title brought by the administrator with the will annexed to recover possession of the portion of the lands sold, coming before the County Court Judge, he dismissed it with costs. The plaintiff appealed to the Judge of Assize, who stated a case for the consideration of the Court of Appeal. The Case Stated contained a statement that P. McG. (who had obtained a grant of letters of administration), on 30th January, 1923, executed a transfer of the lands and conveyed the same as personal representative. It was contended, on behalf of the plaintiff, (a) that the transfer was made by P. McG., as personal representative, under the grant of administration intestate, and that, as it now appeared that the deceased had disposed of the property by will, no property passed under the transfer; (b) as the transfer was not registered no property passed; (c) as the Land Commission did not consent to the sub-division of the lands on the folio no property passed; and (d) that the folio was conclusive as to the title to the lands. *Held*, by the Court of Appeal (Andrews and Best, L.J.J.)—(a) that the grant of administration was not void *ab initio*, and that the purchaser had acquired a good title; *Hewson* v. *Shelley* [1914], 2 Ch. 13, followed: (b) that the provisions of section 30 (1) of the Northern Ireland Land Act, 1925, were not retrospective and had no application to the present case; (c) that the folio was not conclusive as to the title of the registered owner. *McParland* v. *Conlon.*

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LAND REGISTRY (2)—LOCAL REGISTRATION OF TITLE—*Purchaser for value without notice—Conclusiveness of the register—Easements—Pollution of already polluted stream—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vic.*, *c.* 66), *sects.* 25, 29, 30, 34, 45 (*j*), 46, 47 (*g*), 55, 57. The plaintiff and defendant were the owners of adjoining lands, all of which were purchased under the Land Purchase Acts, and were registered under the Local Registration of Title (Ireland) Act, 1891. By indenture of

8th March, 1911, the defendant conveyed to the I. S. Co., Ltd., the predecessors in title of the plaintiff, certain lands, together with certain rights, including full power and authority to stop up and divert into the Company's property the water in a stream running down by a fence in "T" Lane. The water in this stream was impregnated with salt from the mines in the neighbourhood, and in 1898, to convey pure water, a pipe had been laid along the bank of the stream. In 1910 the I. S. Co., Ltd., renewed the pipe, but laid it in the bed of the stream. Any water which passed through the pipe unused had, prior to 1910, flowed on into the "T" Lane stream, but on 1st January, 1910, certain parties who were interested in the use of the water in the pipe, by a document addressed to the I. S. Co., Ltd., consented to the Company joining on a pipe to the existing pipe for the purpose of conveying any surplus water running in the pipe to their works. By a deed dated 1st September, 1911, the defendant conveyed to the I. S. Co., Ltd., full power and authority to take, use and enjoy all the water issuing and coming from another river or stream shown on a map endorsed on said deed, and to divert between the points marked "X" and "Y," and convey the same water to the portion of the lands marked "A." The lands so acquired by the I. S. Co., Ltd., together with all rights appurtenant thereto, were subsequently purchased by the plaintiff, who on 3rd June, 1923, was duly registered as owner in fee simple. This deed was registered in both folios, in the I. S. Co.'s folio as an easement, and in the defendant's folio as a burden in terms similar to those contained in the deed, but instead of referring, as was done in the deed, to the water issuing or coming from the river or stream shown on the map endorsed on the deed, the reference was to the river or stream shown on the office maps. The office map was at variance both with the map on the deed and with the facts as they were proved to have existed. It was contended on behalf of the plaintiff that her rights were determined by the entries on the folio taken in conjunction with the office map, and that under the Local Registration of Title (Ireland) Act, 1891, these entries were conclusive in her favour. *Held*, by Wilson, J., that the water in the stream which the plaintiff was at liberty to stop up and divert into her own property included both the water flowing in the pipe in the stream and the water flowing in the bed of the stream; *Held*, also by Wilson, J., that the entries on the folio, together with the office map, were conclusive in the plaintiff's favour. *Held*, by the Court of Appeal, reversing Wilson, J., (a) that the "water in the 'T' stream" did not include the water flowing in the pipe in the stream, and (b) that the office map was not conclusive as to the extent or character of burdens or easements affecting the lands. *Devoy* v. *Hanlon* ([1929] I.R. 246) approved. *Pim* v. *Coyle* ([1907] 1 I.R. 330) considered. *Miscampbell* v. *McAlister*.

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NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—*Findings of Jury—Cause of accident—Absence of Light.* The plaintiff sustained injuries as the result of a collision which occurred between his motor bicycle and the defendant's motor car. The plaintiff alleged that he was riding his bicycle round a left-hand bend, and the defendant's car, which was coming round the bend in the opposite direction, and on the wrong side of the road, collided with his machine. The defendant contended that his car was on its proper side of the road, and that it was by reason of the fact that the plaintiff was on the wrong side of the road that the accident took place. At the trial of the action the jury found that the plaintiff was on his proper side of the road when the collision happened; that the defendant was guilty of negligence and that the plaintiff was guilty of contributory negligence. On being sent back to consider the questions further, the jury found that the defendant's negligence caused the accident, and they assessed a sum for

damages. In answer to a supplemental question the jury found that the plaintiff's contributory negligence consisted in not keeping a proper look-out and having no light on his machine. On the answers of the jury the Trial Judge abstained from giving judgment for either party, and left the parties to move for judgment. Both the plaintiff and the defendant applied to the Court of Appeal for judgment, the plaintiff asking alternatively for a new trial. The Court of Appeal (Best, L.J., dissenting) refused the plaintiff's motion and entered judgment for the defendant. *Held*, by the House of Lords (reversing the judgment of the Court of Appeal and upholding the dissenting judgment of Best, L.J.), that on the findings of the jury the plaintiff was entitled to judgment. *Woods* v. *Davison*.

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[K.B.D. 156

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PROBATE—ADMINISTRATION—*Parties Entitled—Universal Legatees—Practice—County Court Decree—Effect of—Probate Act (Ireland)*, 1857, (20 & 21 *Vict., c.* 79), *section* 59. A. M. died on 13th April, 1929, unmarried. By his will he bequeathed to James C. £35 on deposit receipt, and his land, cattle and other goods to John C. and James C. equally. The next of kin of the deceased were M. J. L. and John M., who resided in Northern Ireland, and C. M., M. M., and James M., who resided in the United States of America. M. J. L. and John M. entered a caveat against the issue of a grant of letters of administration with the will annexed to John C. and James C., and ultimately M. J. L. was made defendant in a testamentary civil bill which duly came on for hearing before the County Court Judge of F. The County Court Judge made a decree upholding the will, and, following the form of decree (F.1) prescribed, directed that administration with the will annexed should be granted to the plaintiffs, John C. and James C. An application was made to the Probate Registry for a grant of administration with the will annexed to John C. and James C. The Chief Registrar required the three next of kin, resident in the United States of America, to be cited to accept or refuse the grant, and refused the application until these parties had been disposed of. The applicants applied ex parte to the Lord Chief Justice for an order that the grant should be made to them. When the application first came before the Lord Chief Justice, the ground given for dispensing with the service of citations on the three next of kin resident in the United States of America was that their whereabouts was not known. Moore, L.C.J., adjourned the application, and directed the registrar to communicate with the next of kin resident in Northern Ireland, who had been defendants in the civil bill regarding their brothers and sister in the United States, and in reply it was stated that they were all living together at an address in New York. On the matter coming again before Moore, L.C.J., he directed that the applicants should be at liberty to issue a citation to accept or refuse administration against the three next of kin in America. The applicants appealed, and it was contended on their behalf (a) that

they were universal legatees under the will and as such were entitled to the grant in priority to the next of kin; (b) that section 59 of the Probate Act (Ireland), 1857, was conclusive of the applicants' right to the grant, and that the registrar had really no option, and must issue the grant to the applicant in whose favour the decree had been made. *Held*, by the Court of Appeal:—(a) That the applicants were not universal legatees under the will, and were not entitled to the grant in priority to the next of kin; (b) that section 59 of the Probate Act (Ireland), 1857, does not expressly provide that the grant must necessarily be made to the applicant in whose favour the decree had been made, if the registrar is satisfied as to the existence of any other person possessing a prior right which would make a grant to the applicant improper. The order of Moore, L.C.J., was therefore affirmed. *In the Goods of Alexander Mulligan.*

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